

On the Basis of Sex(ual Orientation Or Gender Identity): Bringing Queer Equity to School with Title IX

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NOTE

ON THE BASIS OF SEX(UAL ORIENTATION OR GENDER IDENTITY): BRINGING QUEER EQUITY TO SCHOOL WITH TITLE IX

Chan Tov McNamara†

A transgender fourth-grader's teacher refuses to address her by her preferred name and gender. A lesbian high-school student's sexual education class does not teach her about topics relevant to her experience as a queer woman. A gay male college student's campus does not have LGBT-specific post-sexual assault care. Under a formal equality approach to Title IX, can any of these discriminations be remedied? Unfortunately not.

And yet, recent victories for the LGBT community have been won on formal equality arguments—that LGBT persons should be treated the same as heterosexual, cisgender persons. In the shadow of marriage equality, the LGBT community has pivoted towards fighting other aspects of discrimination, most recently in the educational setting. There, they have continued to apply formal equality legal strategies. However, as this Note contends, the use of Title IX as a tool of formal equality is antithetic to the substantive equality theoretical underpinnings of the statute. In response, this Note imagines an approach that honors the substantive equality mandate at the heart of Title IX.

The results are transformative; once one appreciates the proposition that simply guaranteeing queer students access to existing services is insufficient to ensure that LGBT students actually receive equal access to the benefits of educational

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opportunities, Title IX becomes a comprehensive tool for advancing queer student equity. Ultimately, this Note concludes by illustrating how Title IX can provide substantive equality for queer students at every level of the educational system.

INTRODUCTION	747
I. THE THEORETICAL UNDERPINNINGS OF TITLE IX.....	753
A. The Debate Around Equality	754
B. Title IX's Substantive Equality Mandate	757
II. "ON THE BASIS OF SEX"	760
A. The Title VII and Title IX Helix	761
B. "Sex" as Sexual Orientation.....	762
1. <i>Sexual Orientation Discrimination as Sex</i> <i>Stereotyping Discrimination</i>	762
2. <i>Sexual Orientation Discrimination as Sex</i> <i>Discrimination Per Se</i>	766
C. "Sex" as (Trans)Gender Identity	767
1. <i>Gender Identity Discrimination as Sex</i> <i>Discrimination Per Se</i>	767
2. <i>Gender-Identity Discrimination as Sex-</i> <i>Stereotype Discrimination</i>	768
D. The Effect of the 2017 OCR Guidance Recession	769
III. "DENIED THE BENEFITS OF"	771
A. <i>Davis v. Monroe's</i> Unresolved Questions.....	771
B. Analysis—When Is a Student Deprived of Equal Access to the Benefits of an Educational Opportunity?	773
1. <i>Educational Opportunities in Cases</i> <i>Involving Race</i>	774
2. <i>Educational Opportunities in Cases</i> <i>Involving Gender</i>	775
3. <i>Educational Opportunities in Cases</i> <i>Involving Students with Disabilities</i>	776
4. <i>Educational Opportunities in Cases</i> <i>Involving Nationality</i>	777
C. Defining the "Benefits" of an Educational Opportunity	778
D. Have Queer Students Been Denied the Benefits of Educational Opportunities?	779
1. <i>Vignette One—Ashley</i>	780
2. <i>Vignette Two—Leon</i>	783
3. <i>Vignette Three—Mark</i>	786
IV. A MODEL OF QUEER STUDENT EQUITY	789
A. The Model.....	790
1. <i>Elementary/Primary Level</i>	790

a. Sexual Orientation and Gender Identity Affirming Instruction & Curricula	790
2. Secondary Level	792
a. LGBT-Issue Trained Counselors	793
b. LGBT-Specific Sexual Education	793
c. LGBT Affirming Social Atmosphere	795
3. Higher Education	796
a. LGBT-Inclusive Sexual Assault Education, Prevention Programs & Treatment	797
CONCLUSION	800
APPENDIX	801

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance¹

INTRODUCTION

In April 2014, during his freshman year of high school, fourteen-year-old Gavin Grimm came out to his family as transgender.² Shortly thereafter, Gavin began seeing a psychologist and was formally diagnosed with Gender Dysphoria.³ In July, in order to begin living in accordance with his male gender identity, Gavin legally changed his name.⁴

Before the start of his sophomore year, Gavin and his mother informed Gloucester High School officials of his gender identity and legal name change, and discussed social transition strategies.⁵ At first, Gavin agreed to use a separate single-stall bathroom in the nurse's office and did not use the boys' locker room.⁶ After finding that arrangement stigmatizing, however, Gavin was given permission to use the male restroom.⁷ This caused concern within the wider Gloucester community, and

¹ 20 U.S.C. § 1681(a) (2012).

² *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 739 (E.D. Va. 2015).

³ Gender Dysphoria is "a medical condition characterized by clinically significant distress caused by an incongruence between a person's gender identity and the person's birth-assigned sex." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016).

⁴ *Id.*

⁵ *G.G.*, 132 F. Supp. 3d at 739–40.

⁶ *Id.* at 740.

⁷ *Id.*

community members began contacting the School Board in an effort to bar Gavin from accessing the boys' restroom.⁸

After using the boys' restroom for over seven weeks, Gavin became aware of a School Board meeting organized, in part, by parents and community members determined to "keep that girl out of the boy's room."⁹ The meeting would become the first of two community discussions related to whether Gavin should be allowed to use the bathroom that corresponded with his gender identity.¹⁰ Ultimately, on December 9, 2014, the School Board folded to public pressure and voted 6–1 against Gavin's access to male restrooms.¹¹

Afterwards, the school principal informed Gavin that he would be disciplined if he continued to use the boys' restroom and restricted Gavin to using one of the school's private or single-stall facilities.¹² In response, the American Civil Liberties Union initiated a Title IX claim against the Gloucester County School Board, alleging that the school's policy preventing Gavin from using the boys' bathroom discriminated on the basis of sex, and forcing Gavin to use separate restrooms stigmatized and isolated him.¹³ The case was ultimately removed up to the Fourth Circuit Court of Appeals, and the Supreme Court granted certiorari in October 2016.¹⁴

The responses were legion. One side of the conversation contended that Gavin was "not a boy, and the Supreme Court can never change that."¹⁵ On the other, LGBT activists claimed the case was about equal treatment—"a boy asking his school

⁸ G.G., 822 F.3d at 715.

⁹ Gavin Grimm, Opinion, *Gavin Grimm: The Fight for Transgender Rights Is Bigger than Me*, N.Y. TIMES (Mar. 7, 2017), https://www.nytimes.com/2017/03/07/opinion/gavin-grimm-the-fight-for-transgender-rights-is-bigger-than-me.html?_r=0 [https://perma.cc/QE45-987B].

¹⁰ At both School Board meetings, community members were extremely transphobic—referring to Gavin as a "girl," "young lady," "freak," and comparing him to an animal. See G.G., 822 F.3d at 716.

¹¹ *Id.*

¹² G.G., 132 F. Supp. 3d at 741.

¹³ *Id.*

¹⁴ See Emma Green, *The Trump Administration May Have Doomed Gavin Grimm's Case*, ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/03/the-trump-administration-may-have-doomed-gavin-grimm/518676/> [https://perma.cc/BAL6-RC92].

¹⁵ Daniel Payne, *Gavin Grimm Is Not a Boy, and the Supreme Court Can Never Change That*, FEDERALIST (Nov. 4, 2016), <http://thefederalist.com/2016/11/04/gavin-grimm-not-boy-supreme-court-can-never-change/> [https://perma.cc/HGV9-SKSH].

to treat him just like any other boy,”¹⁶ while insisting Gavin “just wanted to use the bathroom.”¹⁷ In the fall of 2016, LGBT-rights activists and supporters nationwide waited in anticipation to see if the Court would affirm transpersons’ “basic rights.”¹⁸ They would be disappointed.

On March 6, 2017, the Supreme Court announced that it would not decide Gavin’s case because the Trump Administration had reversed the government’s position on transgender student protections.¹⁹ Instead, the Court remanded the case to the Fourth Circuit to be reconsidered in light of the guidance rescission.²⁰

Like many recent LGBT-rights cases,²¹ the Gavin Grimm case—framed around transpersons’ equal access to restrooms—is a model of formal equality.²² In adopting this approach, LGBT rights activists have both mimicked and explicitly invoked tactics used by the 1960s Civil Rights Move-

¹⁶ Dan Rodricks, *Judge Sees a Boy, Not a Disorder*, BALT. SUN (Apr. 18, 2017, 7:28 PM), <http://www.baltimoresun.com/news/maryland/dan-rodricks-blog/bs-md-rodricks-0419-20170418-story.html> [<https://perma.cc/TR99-AVTV>].

¹⁷ Moriah Balingit, *Gavin Grimm Just Wanted to Use the Bathroom. He Didn’t Think the Nation Would Debate It*, WASH. POST (Aug. 30, 2016), https://www.washingtonpost.com/local/education/gavin-grimm-just-wanted-to-use-the-bathroom-he-didnt-think-the-nation-would-debate-it/2016/08/30/23fc9892-6a26-11e6-ba32-5a4bf5aad4fa_story.html?utm_term=.e2f4de043299h [<https://perma.cc/QLJ4-FM3Q>].

¹⁸ Adam Liptak, *Supreme Court Won’t Hear Major Case on Transgender Rights*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/supreme-court-transgender-rights-case.html> [<https://perma.cc/QTX8-2GT7>] (quoting Sarah Warbelow, Legal Director of the Human Rights Campaign).

¹⁹ See *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017); Liptak, *supra* note 18.

²⁰ See sources cited *supra* note 19.

²¹ See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (framed as “equal treatment” of same-sex couples); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (framed as “equal marriage” for same-sex couples); *Lawrence v. Texas*, 539 U.S. 558 (2003) (framed as “equal right” to engage in private, consensual sexual conduct); see also Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1063 (2014) (confirming the marriage equality movement’s endorsement of formal equality).

²² Formal equality involves the idea that on its face law should treat all persons equally, regardless of protected identity (e.g., race, gender, sexual orientation). That is, processes should treat all persons equally. The theory, however, does very little to address underlying subjugation based on protected identity and thus does not ensure equality of substantive outcomes. See *infra* Part I.

ment²³ and the 1970s Women's Rights Movement.²⁴ Because of the LGBT community's vulnerability,²⁵ urgent need for legal protections,²⁶ and recent successful uses of such approaches,²⁷ framing LGBT rights cases in formal equality terms may seem like a valuable legal strategy.²⁸ Nevertheless, by echoing the call for formal equality originated by Civil Rights Movement lawyers, while simultaneously disregarding possible

²³ In a recent article, Professor Russell K. Robinson collected a range of illustrations:

In 2004, after San Francisco mayor Gavin Newsom authorized city officials to marry same-sex couples, a *Chicago Tribune* writer compared Newsom to Dr. Martin Luther King and iconic civil rights activist Rosa Parks. Eight years later, marriage equality advocates in North Carolina ran a black-and-white advertisement that featured the image of two water fountains, one marked "Straight" and the other "Gay," with the tag line: "On May 8, make history. Don't repeat it." . . . During the same month, *SF Weekly*, a San Francisco alternative newspaper, ran a cover story on sexual orientation-based bullying entitled "The Gay Selma."

Robinson, *supra* note 21, at 1012 (footnotes omitted); see also Craig J. Konnoth, Note, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s*, 119 YALE L.J. 316, 340–52 (2009) (tracking the appropriation of Black civil rights strategies by the early gay rights movement).

²⁴ See generally Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 248–49 (1998) (describing the use of formal equality strategies in the 1970s second wave of Feminism).

²⁵ See, e.g., Haeyoun Park & Iaryna Mykhalyshyn, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html> [<https://perma.cc/MV8C-7U27>] (reporting that LGBT persons are the most targeted minority group for hate crimes).

²⁶ LGBT individuals are largely unprotected from the discriminatory whims of both private and governmental actors. Public debates centering around LGBT persons' basic rights—transpersons' right to use the bathroom of their gender identity, and whether businesses may discriminate against gay people exercising their constitutional right to marry—are a testament. See generally Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL'Y 1, 3–6 (2016) (summarizing legal developments and debates over transgender bathroom and locker-room rights); Terri R. Day & Danielle Weatherby, *Contemplating Masterpiece Cakeshop*, 74 WASH. & LEE L. REV. ONLINE 86, 93–96, 99–100 (2017) (summarizing the debates surrounding *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 370 P.3d 272 (Colo. App. 2015), *rev'd*, 137 S. Ct. 1719 (2018)).

²⁷ See Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 869 (2000) ("[M]any, if not most, of the practical successes for sexual others have emanated from the formal equality model . . .").

²⁸ Indeed, others have documented that framing LGBT rights as "equal rights" is seen as a useful counter to the so-called "special rights frame"—one that "challenges quests for equal rights, like LGBT-inclusive antidiscrimination policy, by asserting that such rights are unnecessary claims for special treatment." Erin M. Adam & Betsy L. Cooper, *Equal Rights vs. Special Rights: Rights Discourses, Framing, and Lesbian and Gay Antidiscrimination Policy in Washington State*, 42 LAW & SOC. INQUIRY 830, 831 (2017).

long-term effects, LGBT rights activists damn themselves to repeat many of the mistakes previous American civil-rights movements have made.²⁹

In the Gavin Grimm case and the larger Title IX sphere, formal equality arguments are shortsighted,³⁰ ignore the statute's legislative history,³¹ and frustrate the purpose of the statute.³² Indeed, the use of Title IX as a tool of formal equality is antithetic to the substantive equality mandate at the heart of the statute, and falls short of giving Title IX "a sweep as broad as its language."³³ Most importantly, simply guaranteeing queer students equal access to existing educational services—the requirement of formal equality—is insufficient to ensure

²⁹ In particular, "father" of Critical Race Theory (CRT) and former NAACP Legal Defense Fund litigator, the late Derrick Bell spoke extensively on the failings of using formal equality strategies in the school desegregation cases. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 478 (1976). Generally, Critical Race Theorists have been avid proponents of the theory that the use of formal equality arguments has produced few improvements in the well-being and livelihoods of African Americans. See, e.g., Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1056 (1989) ("[O]nce Jim Crow was defeated and formal equality was achieved, the ideology of equal opportunity became a strait jacket on racial progress. It legitimated, rather than challenged, racial injustice."); Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACK-LETTER L.J. 1, 81 (2002) (discussing the development of CRT, in part as a reaction to the failings of formal equality strategies used during the Civil Rights Movement). More recently, Professor Russell K. Robinson made the argument that Equal Protection jurisprudence—rooted in formal equality—has even reversed civil rights retrenchments. Robinson, *supra* note 21, at 1062 ("From contexts such as schooling to government contracting to voting rights, the Court has invoked strict scrutiny in order to scrutinize closely and often invalidate race-based policies meant to address racial subordination."). The Feminist legal movement has similarly come to the realization that formal equality strategies no longer serve women's best interests. See, e.g., Becker, *supra* note 24, at 272 ("Today, however, we live in a different world. In this world, formal equality is a barrier to the flexibility and experimentation needed to combat the new, sex neutral ways in which law supports patriarchy."). In the LGBT context, several scholars have begun to warn against the use of formal equality arguments. See, e.g., Libby Adler, *Gay Rights and Lefts: Rights Critique and Distributive Analysis for Real Law Reform*, 46 HARV. C.R.-C.L. L. REV. (AMICUS ONLINE SUPPLEMENT) 1, 5–7 (2011) [hereinafter Adler, *Gay Rights and Lefts*] (critiquing LGBT use of formal equality strategies); Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147, 192–97 (2009) [hereinafter Adler, *The Gay Agenda*] (same); Dean Spade, *Documenting Gender*, 59 HASTING L.J. 731, 748–49 (2008) (questioning formal equality's usefulness for protections for transgender persons).

³⁰ See sources cited *supra* note 29.

³¹ See *infra* Part I.

³² See *infra* Part I.

³³ *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

that LGBT students *actually* receive equal access to the benefits of educational opportunities.³⁴

That concern is the focus of this Note. Previous scholarship framing solutions to anti-queer discrimination in terms of formal equality³⁵ has largely ignored the advances Title IX could mean for queer student equity.³⁶ In response, this Note offers illustrations of how Title IX can provide substantive equality—that is, equality of outcomes—for queer students at every level of the educational system.

The Note proceeds as follows. Part I summarizes the debates surrounding the model of equality guaranteed by Title IX. It provides evidence that the mandate at the heart of Title IX is one of substantive equality, not formal equality.

Part II then examines approaches courts have taken to extend Title IX protections to cover instances of discrimination against Lesbian, Gay, and Bisexual (LGB) students, as well as Transgender students. It will establish that Title IX can and does cover discrimination faced by such students. Of course,

³⁴ See *infra* subpart III.D (using vignettes to illustrate this point); see also Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”? Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358, 1369 (2000) (“[G]ay and lesbian political activism focuses much of its resources on securing formal equality rather than on pursuing substantive equality [E]xtreme poverty, subtle and systemic discrimination, and other current effects of historical subordination limit the benefits that a formal equality framework can deliver to oppressed classes.”); cf. Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1075 (1996) (making the point that formal equality strategies fail to protect religious minorities).

³⁵ See, e.g., Erin Buzuvis, “On the Basis of Sex”: Using Title IX to Protect Transgender Students from Discrimination in Education, 28 WIS. J.L. GENDER & SOC’Y 219, 237–40 (2013) (examining only Title IX’s possible protection against bullying, admissions, and expulsion); Alanna M. Jereb, Note, *The Bathroom Right for Transgender Students and How the Entire LGBT Community Can Align to Guarantee This*, 7 WAKE FOREST J.L. & POL’Y 585, 587–90, 592–97 (2017) (considering Title IX protections only as they regard transpersons’ use of bathrooms); Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool to Stop Bullying of LGBT Students*, 125 YALE L.J. 2006, 2024–27 (2016) (examining Title IX’s protection only in the limited sphere of anti-LGBT bullying); Robin Fretwell Wilson, *Squaring Faith and Sexuality: Religious Institutions and the Unique Challenge of Sports*, 34 LAW & INEQ. 385, 401–03, 420–22 (2016) (considering Title IX possibilities only in relation to athletics at religious educational institutions).

³⁶ See Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 85 (2008) (“Although formal equality—treating trans people the same as non-trans people despite gender non-conformity—may reduce instances of blatant discrimination, it also serves to conceal and perpetuate the underlying stigmatization of non-conformity to gender norms.”); Levit, *supra* note 27, at 869 (“[T]he [formal equality] model is fraught with difficulties.”); see also Adler, *The Gay Agenda*, *supra* note 29, at 192 (criticizing the LGBT rights movement’s use of formal equality strategies, and warning of negative long-term effects of their use).

the Trump Administration's revocation of Obama-era Title IX guidelines is thought to have added turbulence to the process of using Title IX to protect queer students.³⁷ But as this Part will show, the administration's actions have been largely innocuous.

In order to demonstrate that LGBT students are continuously deprived of the benefits of educational opportunities, one must first determine when such deprivation occurs. Part III therefore lays this necessary foundation by examining Supreme Court cases expressing the Court's understandings of when the benefits of educational opportunities have been denied. By doing so, it will establish a coherent concept of the benefits of educational opportunities and illuminate when they have been withheld.

Against that backdrop, Part IV argues that queer students have been ubiquitously denied educational benefits. It will document several examples in which LGBT students are deprived of equal access to resources, services, and opportunities guaranteed to them under Title IX. The remainder of the Part offers an image of an education model, including example services, that Title IX might require from an educational institution to ensure that LGBT students are not denied core educational benefits.

I

THE THEORETICAL UNDERPINNINGS OF TITLE IX

Establishing the backdrop for the remainder of this Note's analysis, this Part begins by presenting the differences between the two most prominent theories of equality in legal scholarship: formal and substantive equality. Charting one of this Note's focal claims, the latter sections of this Part assert that the core theory at the heart of Title IX is substantive equality—the equalizing of outcomes rather than processes, and the possible use of affirmative interactions and remedial policies to accomplish this. These subparts will demonstrate that as intended, written, and applied, Title IX takes a substantive equality approach to formulating solutions to discrimination within educational settings.

³⁷ See, e.g., Logan Casey, *After Trump Rescinds Title IX Guidance, What's Next for Transgender Students' Rights?*, BROOKINGS (Mar. 1, 2017), <https://www.brookings.edu/blog/brown-center-chalkboard/2017/03/01/after-trump-rescinds-title-ix-guidance-whats-next-for-transgender-students-rights/> [https://perma.cc/UU2A-ZAQV].

A. The Debate Around Equality

Since the Senate enacted Title IX in 1972, feminist scholars have debated the characteristics of “equality” guaranteed by its text.³⁸ Within wider feminist theory there may be as many understandings of equality as there are feminists.³⁹ However, with regards to Title IX, feminist understandings of equality fall into two major categories: formal equality and substantive equality.⁴⁰

The theory of formal equality is rooted in the principle of equal treatment.⁴¹ As summarized by Professor Catharine MacKinnon, the principle holds “if one is the same, one is to be treated the same.”⁴² Thus, in feminist legal theory, formal equality emphasizes “same-treatment solutions to sex-based inequality.”⁴³ In short, it rejects gender-based classifications by asserting that women and men are equal and therefore should be treated as such.⁴⁴

As a part of formal equality feminists’ rejection of gender-based classifications, during the 1970s, they downplayed and de-emphasized biological differences between the genders, particularly pregnancy.⁴⁵ Indeed, formal equality feminists characterized pregnancy as a “temporary disability” in order to

³⁸ See, e.g., Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 30–31 (2000) [hereinafter Brake, *Sex Equality in Sport*] (noting different interpretations regarding the type of equality required by Title IX).

³⁹ See David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 259 (2005) (collecting examples and concluding, “[t]here are almost as many strands of feminist theory as there are feminist scholars”); cf. Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 514 (2007) [hereinafter Brake, *Pragmatic Feminism*] (describing Title IX as pragmatic—“an example of liberal feminism, special treatment, structuralism, dominance feminism and different voice feminism”).

⁴⁰ See Rutherford, *supra* note 34, at 1073 (describing various definitions of equality).

⁴¹ See, e.g., Katharine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the California Law Review*, 100 CAL. L. REV. 381, 392 (2012) (summarizing formal equality’s principle of justice as “similarly-situated people should be treated alike even if as a result of different circumstances they are affected differently by that same treatment”).

⁴² CATHARINE A. MACKINNON, SEX EQUALITY 4–5 (2001). See also Rutherford, *supra* note 34, at 1072 (“Formal equality calls for identical treatment, and does not allow for existing differences, while substantive equality requires individualized treatment to yield equal opportunity.”).

⁴³ Brake, *Sex Equality in Sport*, *supra* note 38, at 26.

⁴⁴ See, e.g., Bartlett, *supra* note 41, at 392 (“Women are, for virtually all purposes that matter, the same as men, and thus should have all of the same the [sic] rights and entitlements that men have. The same means no less than men, but also no more . . .”).

⁴⁵ See *id.*

advocate for and support sex-neutral solutions.⁴⁶ The Pregnancy Discrimination Act of 1978 best illustrates this formal equality position.⁴⁷ The statute proposed to treat pregnant women equally to men with “comparably disabling conditions.”⁴⁸

Formal equality’s central goal can also be characterized as facial equality; that statutes or processes should be made to apply equally, rather than engender equal outcomes.⁴⁹ Consequently, a common critique has been that formal equality does not ensure any improvements of substantive outcomes.⁵⁰ Other feminist scholars have been vocal in criticizing formal equality for its inability to address gender-related differences.⁵¹ Without addressing these fundamental differences, they contend, “[f]ormal equality . . . can effect only limited change.”⁵² Responding to formal equality’s failure to initiate substantive change, during the 1980s, critical race theorists and feminist scholars began advocating for a theory of equality that considered “substantive circumstances.”⁵³

Critical race theory (CRT) developed in the late 1970s and early 1980s to undertake the project of exposing “how law was a constitutive element of race itself,” and considering “how law constructed race.”⁵⁴ Central to this project was the belief that formal equality theories—embedded in traditional civil rights discourse—had failed to materially change the conditions of

⁴⁶ *Id.* at 393.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Jones, *supra* note 29, at 24 (summarizing Professor Kimberlé Crenshaw’s comments on the formal equality doctrine within the civil rights movement).

⁵⁰ MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 1 (3d ed. 2012) (summarizing criticisms that formal equality “has done little to change the reality of most women’s lives”); Bartlett, *supra* note 41, at 393; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 3 (2008) (“[E]quality,’ reduced to sameness of treatment or a prohibition on discrimination, has proven an inadequate tool to resist or upset persistent forms of subordination and domination.”).

⁵¹ See, e.g., Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1645 (2017) (“Consequently, a formally equal system, for example, may afford identical rights and treatment to all ‘persons,’ yet it may still be *functionally* discriminatory when the people invoking those rights face very different paths and obstacles due to their race, gender, or other characteristics.”).

⁵² Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 247 (1987); see also Fineman, *supra* note 50, at 3 (describing formal equality’s inability to address economic and social disparities amongst groups).

⁵³ Bartlett, *supra* note 41, at 393.

⁵⁴ CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 3 (Kimberlé Crenshaw et al. eds., 1995).

African Americans.⁵⁵ To critical race theorists such as Professor Kimberlé Crenshaw, true equality was substantive, in that it “stresses equality as a *result*, and looks to real consequences for [subordinated classes, such as] African-Americans.”⁵⁶

In a similar vein, feminist support for substantive equality advocated for an equality principle that “address[ed] the actual material or ‘substantive’ circumstances of women, not just their ‘formal’ treatment.”⁵⁷ This approach originated in the context of pregnancy.⁵⁸ There, substantive equality feminists argued that pregnant women should be specially accommodated, despite a lack of comparable accommodations for men.⁵⁹

As a theory, substantive equality rejects the sameness of treatment approach and rather looks to the outcomes of rules while taking into “account . . . differences to avoid differential impacts that are considered unfair.”⁶⁰ Substantive equality’s core goal, then, is to equalize outcomes,⁶¹ and it may include “removing barriers which prevent individuals from performing according to their abilities.”⁶² In sum, substantive equality

⁵⁵ Brake, *Sex Equality in Sport*, *supra* note 33, at 26 (“Equal protection . . . had its moorings in a formal equality perspective . . .”).

⁵⁶ Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455, 464–65 (2005) (alteration in original) (emphasis added) (quoting Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1341 (1988)).

⁵⁷ Bartlett, *supra* note 41, at 393; see MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 3 (1991) (describing substantive equality as an “attempt[] to ensure that the *effects* of rules as they will be applied will place individuals in more or less equal positions”); Catharine A. MacKinnon, *Essay, Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 5, 11 (2011) (detailing how a substantive equality approach seeks to right “material and dignitary deprivations and violations”).

⁵⁸ See Bartlett, *supra* note 41, at 393.

⁵⁹ See *id.*

⁶⁰ ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 55–56 (1994) (“[F]ormal equality . . . targets the wrong evil . . . [because the concept of] sameness between men and women . . . will be simply irrelevant to the true causes and nature of women’s inequality or will backfire and harm rather than help women.” (footnote omitted)); Cohen, *supra* note 39, at 263 (quoting KATHARINE T. BARTLETT, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 265 (3d ed. 2002)).

⁶¹ Substantive equality seeks to equalize outcomes as much as possible but may not concretely require equal outcomes. See Katharine T. Bartlett, *Essay, Gender Law*, 1 DUKE J. GENDER L. & POLY 1, 5 (1994) (“Substantive equality theory focuses on outcomes, but does not necessarily require identical or mirror-image outcomes. Some substantive equality advocates favor equal treatment in some situations and special accommodation in others . . .”).

⁶² Jessica E. Jay, *Women’s Participation in Sports: Four Feminist Perspectives*, 7 TEX. J. WOMEN & L. 1, 24 (1997).

seeks to fully level the playing field and may favor affirmative interventions or remedial policies to do so.⁶³

B. Title IX's Substantive Equality Mandate

Though some scholars have suggested that Title IX is pragmatic—that is, encompassing multiple theories of equality⁶⁴—most scholars fall into one of the two aforementioned camps, arguing that Title IX is rooted in either a formal or substantive equality guarantee.⁶⁵ The debate surrounding the equality that Title IX guarantees is crucial since it determines whether institutions must undertake affirmative interventions or simply apply neutral rules.⁶⁶

On one hand, some scholars looking to Title IX's historical setting have determined that the statute guarantees formal equality.⁶⁷ They support this conclusion with the fact that the formal equality approach was dominant in the 1970s when Title IX was passed.⁶⁸ Moreover, these scholars argue that the substantive equality approach would develop almost a decade after the statute's enactment.⁶⁹

However, the overwhelming consensus in both scholarship and case law has been that Title IX encompasses a substantive, or mostly substantive equality approach.⁷⁰ For example, in

⁶³ Stancil, *supra* note 51, at 1645 (summarizing the views of substantive equality theorists).

⁶⁴ See, e.g., Brake, *Pragmatic Feminism*, *supra* note 39, at 513 (describing Title IX as a “pluralistic and pragmatic” combination of many approaches to feminist legal theory).

⁶⁵ Compare Cohen, *supra* note 39, at 265 (arguing that Title IX looks beyond formal equality and reaches into the realm of substantive equality), with Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401, 417–18 (2010) (“Title IX at its core takes a formal equality approach.”).

⁶⁶ See, e.g., Cohen, *supra* note 39, at 265–66 (discussing how formal equality requires merely acting neutrally, while substantive equality requires affirmative action).

⁶⁷ See, e.g., Koller, *supra* note 65, at 406 (stating that Title IX “ultimately rest[s] on a formal equality approach which requires women and girls to assimilate into the male-constructed, varsity model for sport”); see also Monica J. Stamm, Note, *A Skeleton in the Closet: Single-Sex Schools for Pregnant Girls*, 98 COLUM. L. REV. 1203, 1216 (1998) (arguing that “Title IX follows the formal equality model”).

⁶⁸ See Koller, *supra* note 65, at 419.

⁶⁹ *Id.*

⁷⁰ See, e.g., DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION 8 (2010) [hereinafter Brake, GETTING IN THE GAME] (“Title IX stands out as a law that has had a transformative impact It has escaped many of the pitfalls of other discrimination laws by employing measures of equality that are substantive and results oriented.”); see Deborah L. Brake, *Back to Basics: Excavating the Sex Discrimination Roots of Campus Sexual Assault*, 6

support of this conclusion, Professor David Cohen demonstrates the statute's substantive equality paradigm in the context of its applicability to college athletics.⁷¹ He makes the point that courts have "understood that judging women's equality based on the seemingly neutral measure of interest [in athletic participation] would defeat the purpose of Title IX."⁷² Instead, courts have noted that "[i]nterest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience."⁷³ This reasoning looks towards women's specific circumstances that would make applying a neutral rule inadequate; a key feature of the substantive equality approach.⁷⁴

Similarly, Title IX's substantive equality undercurrents are found in its sexual harassment applications.⁷⁵ Under a formal equality approach, in cases of sexual assault, a court would inquire whether similarly situated students were treated equally.⁷⁶ Consequently, an institution would fulfill its Title IX obligations if it failed to remedy sexual harassment in both male- and female-victim cases.⁷⁷ To the contrary, in practice, once an institution receives actual notice of sexual harassment, under Title IX, administrators are required to take affirmative obligations to remedy such harassment.⁷⁸ This

TENN. J. RACE GENDER & SOC. JUST. 7, 25 (2017); Cohen, *supra* note 39, at 263; see also Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1322 (1991) (noting the Supreme Court "has begun to interpret statutory sex equality mandates in light of substantive equality goals"). Some scholars have argued Title IX encompasses elements of both models of equality. See Deborah L. Brake & Verna L. Williams, *The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX*, 7 VA. SPORTS & ENT. L.J. 199, 213 (2008) ("Specifically, the statute *also* has substantive equality aspects that seek to reform the institutional structures that facilitate inequality." (emphasis added)). Indeed, even in her Article-length treatment of Title IX's formal equality core, Professor Koller concedes that "to some extent" Title IX takes an approach different from the formal equality approach dominant in antidiscrimination law. See Koller, *supra* note 65, at 421-24 (detailing the substantive equality elements of the statute).

⁷¹ See Cohen, *supra* note 39, at 263.

⁷² *Id.* (quoting *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996)).

⁷³ *Cohen*, 101 F.3d at 179.

⁷⁴ See Cohen, *supra* note 39, at 263.

⁷⁵ See *id.* at 265-66.

⁷⁶ See *id.*

⁷⁷ Recall that formal equality only requires sameness of treatment. Hence if both men and women are provided inadequate services, formal equality has been satisfied.

⁷⁸ See Cohen, *supra* note 39, at 266-67 ("In requiring schools to do so, the Court has imposed on schools a mandate that appreciates the damaging effects that peer sexual harassment on students' education, particularly that of girls and young women.").

represents an approach that is fundamentally deeper than formal equality.⁷⁹

Title IX's remedial purposes are further evidence of the statute's substantive equality objectives.⁸⁰ Title IX was enacted to accomplish two remedial goals: "avoid[ing] the use of federal resources to support discriminatory practices" and "provid[ing] individual citizens [with] effective protection against those practices."⁸¹ The legislative history of Title IX evidences congressional concern with developing a "strong and comprehensive"⁸² remedy to the "persistent, pernicious discrimination which [was] serving to perpetuate second-class citizenship for American women,"⁸³ rather than solely focusing on the formal equality of female students.⁸⁴

In fact, a formal equality model of Title IX would fail to achieve either of the remedial goals Congress sought to accomplish when enacting the statute.⁸⁵ Simply ensuring that the *processes* of education are facially neutral does very little to ensure equality of educational opportunity.⁸⁶ And courts have consistently agreed.⁸⁷ In *De La Cruz v. Tormey*, for instance, the Ninth Circuit Court of Appeals rejected a formalist approach to Title IX equality.⁸⁸ In *Tormey*, female students and prospective students brought a claim alleging that defendant college officials violated Title IX by refusing to establish on-campus child care facilities.⁸⁹ The court found that responsibilities for child care overwhelmingly fell on women, such that the "absence of child care facilities effectively bars them from obtaining the benefits of higher education."⁹⁰ Though the court did not explicitly hold that the defendants were required

⁷⁹ *Id.* ("[L]ooking behind a practice that appears neutral on its face and requiring a remedy that attempts to substantively equalize educational access, Title IX goes far afield of . . . formal equality theory.").

⁸⁰ See, e.g., Claudia S. Lewis, *Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language with Its Broad Remedial Purpose*, 51 *FORDHAM L. REV.* 1043, 1046 (1983) (discussing the remedial nature of Title IX and collecting congressional record evidence that Congress intended the statute to be remedial).

⁸¹ *Id.*

⁸² 118 *CONG. REC.* 5806 (1972) (statement of Sen. Bayh).

⁸³ *Id.* at 5804.

⁸⁴ Cohen, *supra* note 39, at 271.

⁸⁵ See *supra* note 65.

⁸⁶ See, e.g., Cohen *supra* note 39, at 261 (discussing how facially neutral laws can "reinforce the status quo of inequality").

⁸⁷ See Koller, *supra* note 65, at 423 ("Courts frequently have endorsed the substantive, or 'structural' equality elements of Title IX.").

⁸⁸ See 582 F.2d 45, 56–57 (9th Cir. 1978).

⁸⁹ *Id.* at 47.

⁹⁰ *Id.*

to establish child care facilities, the opinion implies an expansive and substantive approach to Title IX equality.⁹¹ In contrast, the dissent offered a formal equality approach arguing that the plaintiffs had been treated no differently than male students.⁹²

Collectively, in light of this evidence, it is clear that Title IX is rooted in a substantive equality mandate. Establishing this opens the possibilities for imposing affirmative obligations and remedial requirements aimed at ensuring equality of outcomes.⁹³ Against this foundation, the following Parts will demonstrate that Title IX extends to discrimination against LGBT students, that the educational system fails to provide LGBT students equal benefits, and that Title IX's substantive equality underpinnings demand that schools take affirmative steps to remedy these inequalities.

II

"ON THE BASIS OF SEX"

On its face, neither sexual orientation nor gender identity are included within the text of Title IX.⁹⁴ Nevertheless, over the past decade, courts have expanded Title IX's applicability to provide protection against anti-LGBT discrimination.⁹⁵ This Part will establish that queer students are indeed covered by Title IX protections by examining seminal cases in the expansion, and it will summarize the approaches courts have taken to reach such outcomes. The Part will then address the debate around the 2017 Trump Administration's revocation of Obama-era Office for Civil Rights (OCR) Guidance which explicitly stated that Title IX applied to transgender students.

⁹¹ *Id.* at 60–61.

⁹² *Id.* at 75.

⁹³ Brake, GETTING IN THE GAME, *supra* note 70, at 17 ("In forsaking gender blindness for a more gender-conscious, result-oriented model, Title IX has chosen substantive equality over formal equality. This choice has created the potential for expanding . . . sports participation and inciting broad-based cultural transformation . . .").

⁹⁴ Title IX of the Educational Amendments of 1972 reads in part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" 20 U.S.C. § 1681(a) (2012).

⁹⁵ See, e.g., *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159–60 (C.D. Cal. 2015) (holding that claims of discrimination based on sexual orientation are covered by Title IX); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1169–71 (N.D. Cal. 2000) (holding that harassment based on a victim's homosexuality can constitute sexual harassment under Title IX).

A. The Title VII and Title IX Helix

Since the 1990s, courts have struggled to differentiate between discrimination based on sexual orientation and gender identity and discrimination on the basis of sex for Title VII and Title IX purposes.⁹⁶ Many courts have held that the two claims intertwine,⁹⁷ though a minority have undertaken the effort of seeking to extract the claims from one another.⁹⁸

Whatever the approach, in applying Title IX to protect queer students, courts are guided by interpretations of Title VII.⁹⁹ As such, twin landmark decisions confirming Title VII's application to sexual orientation and gender identity workplace discrimination—*Zarda v. Altitude Express, Inc.*¹⁰⁰ and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*¹⁰¹—strongly suggest

⁹⁶ See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (“[T]he line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw.”); *Centola v. Potter*, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) (“[T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear.”).

⁹⁷ See, e.g., *Videckis*, 150 F. Supp. 3d at 1159 (“Simply put, the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”). But see *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (arguing that plaintiffs should not be allowed to “bootstrap protection for sexual orientation discrimination into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine”).

⁹⁸ See *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 708 (7th Cir. 2016) (collecting examples where courts have “tease[d] apart” sexual orientation and sex discrimination claims).

⁹⁹ See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 617 n.1 (1999) (Thomas, J., dissenting) (collecting cases: “This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX”); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 718 (4th Cir. 2016) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”).

¹⁰⁰ 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (holding that Title VII prohibits discrimination on the basis of sexual orientation); see Alison Frankel, *2nd Circuit Demolishes Key DOJ Argument Against Workplace Protection for Gays*, REUTERS (Feb. 26, 2018, 3:43 PM), <https://www.reuters.com/article/legal-us-otc-titlevii/2nd-circuit-demolishes-key-doj-argument-against-workplace-protection-for-gays-idUSKCN1GA2OY> [<https://perma.cc/8C5A-FVMS>].

¹⁰¹ 884 F.3d 560, 567 (6th Cir. 2018) (holding employment discrimination based on transgender status violates Title VII and that businesses may not use the Religious Freedom Restoration Act to discriminate against transgender employees); see Patrick Dorrian, *Bias Against Transgender Workers Is Sex Bias Under Federal Law*, BLOOMBERG (Mar. 7, 2018, 5:54 PM), <https://bna.bna.com/daily-labor-report/bias-against-transgender-workers-is-sex-bias-under-federal-law-1> [<https://perma.cc/H3T2-GPXX>] (discussing *R.G. & G.R. Harris Funeral Homes, Inc.* and, more broadly, EEOC's successes in enforcing antidiscrimination suits on behalf of LGBT individuals in federal courts).

that Title IX's application to LGBT students will increase in the near future.¹⁰²

B. "Sex" as Sexual Orientation

At present, courts that have extended Title IX protections to Lesbian, Gay, and Bisexual (LGB) students have done so under two distinct rationales originating in Title VII jurisprudence.¹⁰³ The first holds that anti-LGB harassment occurs because victims do not conform to gender stereotypes.¹⁰⁴ The second purports that anti-LGB harassment is sex discrimination per se.¹⁰⁵

1. *Sexual Orientation Discrimination as Sex Stereotyping Discrimination*

The gender-stereotyping rationale has its roots in the Title VII case *Price Waterhouse v. Hopkins*.¹⁰⁶ There, the Supreme Court held that sex discrimination included instances where employees were evaluated on their conformity to stereotypes associated with their gender.¹⁰⁷

Price Waterhouse involved allegations that a female employee was denied partnership due to her failure to satisfy her managers' idea of femininity.¹⁰⁸ The plaintiff, Ann Hopkins, had been denied partnership for two consecutive years despite continually being praised for her ability and record.¹⁰⁹ In her first partnership evaluation, Hopkins's mostly male managers criticized her interpersonal skills, describing her as "macho," claiming she "overcompensated for being a woman," and advising her to take "a course at charm school."¹¹⁰

¹⁰² In addition, on Wednesday, March 7, 2018, LGBT-rights organization Lambda Legal filed a complaint in the Eighth Circuit which, if successful, would reaffirm Title VII's application to sexual orientation. See *Horton v. Midwest Geriatric Mgmt., LLC*, No. 4:17CV2324 JCH, 2017 U.S. Dist. LEXIS 209996 (E.D. Mo. Dec. 21, 2017) (dismissing Horton's sex discrimination claim); *Lambda Legal Presses Fight for Federal LGBT Employment Discrimination Protection in New Appeals Court Case*, LAMBDA LEGAL (Mar. 7, 2018), https://www.lambdalegal.org/blog/20180307_lgbt-employment-discrimination-appeal [<https://perma.cc/M5V2-RXK7>].

¹⁰³ See Kimmel, *supra* note 35, at 2015–16.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; see also *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) ("[C]laims of sexual orientation discrimination are gender stereotype or sex discrimination claims.").

¹⁰⁶ 490 U.S. 228 (1989).

¹⁰⁷ *Id.* at 250–51.

¹⁰⁸ *Id.* at 233–34.

¹⁰⁹ *Id.* at 234.

¹¹⁰ *Id.* at 235.

Explaining the decision to hold Hopkins's partnership candidacy, one partner suggested Hopkins could improve her chances upon review if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."¹¹¹ Based in part upon the partner's comments, the Court concluded that Price Waterhouse's management had discriminated against Hopkins on the basis of her sex.¹¹² Specifically, Price Waterhouse had violated Title VII by impermissibly basing an employment decision upon Hopkins's conformity to stereotypical notions of womanhood.¹¹³

Courts subsequently interpreted *Price Waterhouse* to mean that bullying based upon stereotypical notions of gender identity or behavior, violate Title IX if it sufficiently disrupts a student's ability to receive the benefits of an education opportunity.¹¹⁴ Within these interpretations, courts have diverging theories on how LGB students violate gender stereotypes.

A first school of thought holds that all LGB persons break gender stereotypes on account of their sexuality.¹¹⁵ Courts reason that persons are expected to be sexually attracted to members of the opposite sex, and therefore, it is contrary to gender stereotypes for a girl to be attracted to girls and vice versa.¹¹⁶ Thus, if a student identifies as homosexual, they "will unquestionably be living in a manner contrary to society's general assumptions about men and women."¹¹⁷

To illustrate, in *Videckis v. Pepperdine University*, a California district court applied this approach in a Title IX suit

¹¹¹ *Id.*

¹¹² *Id.* at 258.

¹¹³ *Id.*

¹¹⁴ See Kimmel, *supra* note 35, at 2019 ("Under the gender stereotyping rationale, courts interpret what appears to be sexual orientation discrimination—such as anti-gay epithets—as actually based on sexist stereotypes about masculinity and femininity."); see also Ian Ayres & Richard Luedeman, *Tops, Bottoms, and Versatiles: What Straight Views of Penetrative Preferences Could Mean for Sexuality Claims Under Price Waterhouse*, 123 YALE L.J. 714, 720 (2013) (explaining how the gender stereotyping rationale in *Price Waterhouse* applies to discrimination against sexual minorities).

¹¹⁵ Ayres & Luedeman, *supra* note 114, at 720.

¹¹⁶ See, e.g., *Centola v. Potter* 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. . . . The gender stereotype at work here is that 'real' men should date women, and not other men.").

¹¹⁷ Daniel B. Weddle, *You'd Be Okay if You Weren't So Gay: Ending the Special Treatment of LGBT Students Under Title IX*, 35 W. NEW ENG. L. REV. 425, 431 (2013).

brought by two lesbian basketball team members.¹¹⁸ The plaintiffs alleged that after the team coaches discovered they were dating, the coaches harassed and discriminated against the women.¹¹⁹ In response to the suit, Pepperdine University moved to dismiss on the basis that Title IX only covered discrimination on the basis of gender and not on the basis of sexual orientation.¹²⁰

The Court rejected Pepperdine's motion to dismiss.¹²¹ It reasoned that gender-stereotype discrimination is broad and that "[s]tereotypes about lesbianism, and sexuality in general, stem from a person's views about the proper roles of men and women—and the relationships between them."¹²² Because the coaches' discrimination stemmed from the plaintiffs' lesbian relationship, and therefore the perceived failure to conform to the stereotype that women date men, the court concluded that the plaintiffs had a sound claim for discrimination under Title IX.¹²³

Though the court in *Videckis* used the plaintiffs' lesbian relationship as evidence that they broke sex stereotypes, some scholars parse discrimination resulting from a person's same-sex relationship and discrimination based on a person's failure to conform to stereotypes about their gender as separate theories.¹²⁴ They find that sex stereotypes and same-sex attraction and relationships, while intertwined and overlapping, are not so interchangeable.¹²⁵ This approach is particularly applicable

¹¹⁸ 150 F. Supp. 3d 1151, 1151 (C.D. Cal. 2015).

¹¹⁹ *Id.* at 1154.

¹²⁰ *Id.* at 1157.

¹²¹ *Id.* at 1163.

¹²² *Id.* at 1160.

¹²³ *Id.*

¹²⁴ For instance, Professor Brian Soucek has explained the view as a difference between the "associational theory" of LGBT discrimination, that is discrimination because of the sex of a person's partner (i.e., a same-sex relationship), and discrimination based on a failure to conform to gender stereotype. See Brian Soucek, *Hively's Self-Induced Blindness*, 127 YALE L.J.F. 115, 118–21 (2017). Relatedly, some have argued that discrimination based on homosexuality cannot constitute gender stereotyping—and by extension sex discrimination—because heterosexuality is assumed of both genders as opposed to one. See *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 370 (7th Cir. 2017) (Sykes, J., dissenting) ("To put the matter plainly, heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all.").

¹²⁵ Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 67 (2000) ("Discrimination against lesbians and gay men often is motivated more by how we violate societal sex and gender norms than it is by the much narrower characteristic of specifically how, and with whom, we have sex. Same-sex sexual expression is just one facet of lesbian and gay identity . . .").

to the discrimination faced by young LGB children, who, while breaking sex stereotypes, may be too young to make the theory of “heterosexuality as sex stereotype” applicable. For instance, Professors Anthony Verona and Jeffrey Monks make the point that for many queer youth, homophobic bullying preexists same-sex attraction, and is, instead, the result of a “failure to conform to the gender norms assigned to their sex (*i.e.*, their degree of masculinity if they are male or femininity if they are female).”¹²⁶ They further note, “[m]any gay boys, long before engaging in same-sex sexual activity, share the experience of being taunted and teased for ‘acting queer’ or ‘looking like a faggot’ simply because they are not as aggressive or masculine-appearing as other boys.”¹²⁷

Courts adopting this reasoning focus mainly on a student’s behavior, rather than their same-sex attraction, as evidence of their breaking sex stereotypes.¹²⁸ The court in *Montgomery v. Independent School District No. 709*, for example, took such an approach.¹²⁹ In *Montgomery*, the plaintiff brought a Title IX suit alleging that between kindergarten and tenth grade he was subjected to incessant verbal and physical abuse from his peers.¹³⁰ He further alleged that despite reporting these incidents, few of his harassers received more than verbal reprimands.¹³¹

In rejecting the defendant’s motion to dismiss the Title IX claim, the court highlighted the fact that the plaintiff began facing verbal harassment as early as kindergarten.¹³² The court noted that it was “highly unlikely that at that tender age plaintiff would have developed any solidified sexual preference, or for that matter, that he even understood what it meant to be ‘homosexual’ or ‘heterosexual.’”¹³³ Instead, the court found it was more plausible that the harassment was based on the

¹²⁶ *Id.* at 67–68.

¹²⁷ *Id.* at 67.

¹²⁸ See, e.g., *Bowe v. Eau Claire Area Sch. Dist.*, No. 16-cv-746-jdp, 2017 U.S. Dist. LEXIS 61496, at *7–9 (W.D. Wis. Apr. 24, 2017) (describing homophobic insults as “gender stereotype slurs”); *N.K. v. St. Mary’s Springs Acad. of Fond du Lac Wis., Inc.*, 965 F. Supp. 2d 1025, 1034 (E.D. Wis. 2013) (finding support for the gender stereotyping rationale where the plaintiff’s classmates teased him because of his homosexuality and effeminacy).

¹²⁹ 109 F. Supp. 2d 1081 (D. Minn. 2000).

¹³⁰ *Id.* at 1084–86.

¹³¹ *Id.* at 1086.

¹³² *Id.* at 1090.

¹³³ *Id.*

plaintiff's failure to conform to his peers' stereotypes of masculinity.¹³⁴

2. *Sexual Orientation Discrimination as Sex Discrimination Per Se*

Under the second and less popular rationale,¹³⁵ courts have treated discrimination on the basis of sexual orientation as "straightforward sex discrimination claims."¹³⁶ In *Ray v. Antioch Unified School District*, for instance, the court extended Title IX protections to homophobic harassment based upon the similarities between discrimination on the basis of sex and discrimination on the basis of sexual orientation.¹³⁷ It reasoned that there was no "material difference" between sexual harassment against female students and homophobic bullying against male students. "In both instances," noted the court, "the conduct is a heinous response to the harasser's perception of the victim's sexuality, and is not distinguishable"¹³⁸

The court went on to conclude that "it is reasonable to infer that the basis of the attacks was a perceived belief about Plaintiff's sexuality, i.e. that Plaintiff was harassed *on the basis of sex*."¹³⁹

In his seminal article on sexual orientation discrimination, Professor Andrew Koppelman introduced an alternative theory supporting the "sex discrimination per se" approach.¹⁴⁰ Professor Koppelman reasons that anti-gay discrimination is sex discrimination if the conduct being discriminated against would be tolerated in a person of the opposite sex.¹⁴¹ Thus, "[i]f a business fires Ricky . . . because of his sexual activities with Fred, while these actions would not be taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex."¹⁴²

¹³⁴ *Id.*

¹³⁵ See Kimmel, *supra* note 35, at 2015 n.45 (noting all cases considering the gender stereotype theory have accepted it, though there is an even split between the eight cases that have addressed the sex discrimination per se rationale).

¹³⁶ *Id.* at 2020; see also Soucek, *supra* note 124, at 121 n.36 (collecting sources demonstrating that "sexual orientation discrimination" is inherently tied to the "subordination of women," and preservation of gender norms).

¹³⁷ 107 F. Supp. 2d 1165, 1169-70 (N.D. Cal. 2000).

¹³⁸ *Id.* at 1170.

¹³⁹ *Id.*

¹⁴⁰ See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208 (1994).

¹⁴¹ *Id.*

¹⁴² *Id.*

Recently, Koppelman's theory has found support in both Title IX and Title VII cases.¹⁴³ Consider again the *Videckis* case.¹⁴⁴ In addition to the plaintiffs' gender stereotyping claim, the court also found that the plaintiffs stated a claim for sex discrimination per se.¹⁴⁵ The court reasoned that sex discrimination can "be defined as treating someone differently simply because that person's sex is different from a similarly situated person of the opposite sex."¹⁴⁶ Accordingly, the coaches' animosity towards the lesbian plaintiffs was sex discrimination per se since it would not have occurred if the plaintiffs "had been males dating females."¹⁴⁷

C. "Sex" as (Trans)Gender Identity

Courts have similarly extended Title IX protections to transgender students by interpreting discrimination against transpersons as both sex discrimination per se and sex stereotyping.¹⁴⁸ This section summarizes both approaches.

1. *Gender Identity Discrimination as Sex Discrimination Per Se*

Underlying this interpretation is the understanding that a person's status as transgender is inherently sex based.¹⁴⁹ That is, transgender status is the result of the discordance between a person's sex assigned at birth and the sex with which they identify.¹⁵⁰ Consequently, all discrimination against trans-

¹⁴³ See, e.g., *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 358 (7th Cir. 2017) (Flaum, J., concurring) (finding sexual orientation is sex discrimination within the Title VII context, because: "Fundamental to the definition of homosexuality is the sexual attraction to individuals of the 'same sex.' . . . One cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' and 'own' meaningless.").

¹⁴⁴ *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015).

¹⁴⁵ *Id.* at 1161.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ The First, Sixth, Seventh, Ninth, and Eleventh Circuits have recognized transphobic discrimination as sex discrimination per se. See Plaintiff's Memorandum of Law in Opposition to Motion to Defendant's Motion to Dismiss at 15, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015), https://www.aclu.org/sites/default/files/field_document/120_memo_in_opp_to_mtd.pdf [<https://perma.cc/2TST-S86D>].

¹⁴⁹ See Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 563 (2007).

¹⁵⁰ Plaintiff's Memorandum, *supra* note 148, at 16 ("The incongruence between [Gavin's] gender identity and the sex designated for him at birth is what makes him transgender. Treating a person differently because of the relationship between those two sex-based characteristics is literally discrimination on the basis of 'sex.'").

gender individuals because of their gender nonconformity can be considered sex discrimination.¹⁵¹ Illustratively, the previously discussed Gavin Grimm case made use of this argument.¹⁵²

The “sex discrimination per se” rationale may also be extended to students who have undergone gender affirmation surgery.¹⁵³ Courts have held that discrimination on the basis of sex must also encompass discrimination because of a change of sex.¹⁵⁴ Justice James Robertson aptly illustrated this point with an analogy to religious discrimination:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” . . . Discrimination “because of religion” easily encompasses discrimination because of a change of religion.¹⁵⁵

2. Gender-Identity Discrimination as Sex-Stereotype Discrimination

Utilizing the sex-stereotyping rationale distilled in *Price Waterhouse*, the second approach argues that persons are considered transgender exactly because they transgress stereotypes of gender-appropriate behavior and appearance.¹⁵⁶ This theory holds that because of their desire to live as the opposite sex, transgender individuals do not conform to stereotypes about their assigned sex.¹⁵⁷ For example, in *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, the Sev-

¹⁵¹ *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016) (“Discrimination ‘because of sex,’ . . . is not only discrimination because of maleness and discrimination because of femaleness, but also discrimination because of the *distinction* between male and female or discrimination because of the *properties or characteristics* by which individuals may be classified as male or female.”).

¹⁵² See Plaintiff’s Memorandum, *supra* note 148, at 16.

¹⁵³ This distinction is made since presumably a post-operation transperson’s sex assigned at birth and sex identity align, therefore there is no discordance.

¹⁵⁴ See *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008).

¹⁵⁵ *Id.* at 306.

¹⁵⁶ See *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) (“By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.”); Turner, *supra* note 149, at 563.

¹⁵⁷ See, e.g., *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) (“[A]ny discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is . . . discrimination on the basis of sex as interpreted by *Price Waterhouse*.”).

enth Circuit Court of Appeals upheld a preliminary injunction granting a transgender high school student's access to the boys' restrooms.¹⁵⁸ The court reasoned that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."¹⁵⁹ Consequently, denying the transgender student access to the restroom of his gender identity amounted to sex discrimination, violating Title IX.¹⁶⁰

D. The Effect of the 2017 OCR Guidance Recession

On February 22, 2017, the Department of Justice and the Department of Education jointly withdrew and rescinded 2016 OCR Guidance documents which stated Title IX required that institutions grant transgender students access to the restrooms of their gender identity.¹⁶¹ While some predicted that the rescission would have a negative impact on protections for transgender students,¹⁶² recent court opinions indicate that the February 22, 2017 Dear Colleague Letter rescinding the earlier guidance has had little effect on the extension of Title IX to cover transphobic discrimination.¹⁶³

The November 2017 opinion in *A.H. ex rel. Handling v. Minersville Area School District* summarizes the courts' approach to the 2017 guidance.¹⁶⁴ That court found that the

¹⁵⁸ *Whitaker*, 858 F.3d at 1048.

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* at 1050.

¹⁶¹ See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC. & CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER (2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/VY5F-UN34>] (indicating in this "2017 Guidance" the Departments were "withdraw[ing] and rescind[ing] the above-referenced guidance documents in order to further and more completely consider the legal issues involved").

¹⁶² See, e.g., Casey, *supra* note 37; Steve Lee, *Widespread Condemnation of Trump's Rescission of Title IX Guidance Clarifying Protections for Transgender Students*, LGBT WEEKLY (Feb. 23, 2017), <http://lgbtweekly.com/2017/02/23/widespread-condemnation-of-trumps-rescission-of-title-ix-guidance-clarifying-protections-for-transgender-students/> [<https://perma.cc/5PJL-V2ZZ>].

¹⁶³ See *A.H. ex rel. Handling v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 327 (M.D. Pa. 2017); see also *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1323 (M.D. Fla. 2018) ("[T]he rescission of the old guidance without issuing new guidance does not provide any interpretation of Title IX from the Department of Education."); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 298 (W.D. Pa. 2017) ("On one hand, the 2017 Guidance could be read as a simple rescission of the prior DOE/DOJ's 2015 and 2016 Guidance interpretations, which would mean there is now simply no relevant DOE/DOJ interpretation of the Regulation, and therefore nothing to consider deferring to.").

¹⁶⁴ 290 F. Supp. 3d at 327; *Adams ex rel. Kasper*, 318 F. Supp. 3d at 1323 (echoing this reasoning).

2017 guidance did not create any “‘new’ or different interpretation of Title IX,” nor did it “affirmatively contradict” prior guidelines.¹⁶⁵ Instead, while plaintiffs may still bring Title IX claims when they are restricted from using bathrooms that are consistent with their gender identity,¹⁶⁶ the 2016 guidance cannot be used to support their claims.¹⁶⁷

Similarly, the Seventh Circuit’s *Whitaker* opinion escaped conflict with the 2017 guidance rescission.¹⁶⁸ Strikingly, the court did not consider the joint DOE/DOJ guidance at all in its holding.¹⁶⁹ Rather, the court applied the sex-stereotyping theory to find that the defendant school board’s policy of denying a student access to the bathroom of their gender identity, “punishes that individual for his or her gender non-conformance, which in turn violates Title IX.”¹⁷⁰ The court went on to hold that the school district’s policies also subject transgender students “to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX.”¹⁷¹

More recently, a series of four cases between June and August 2018 provide further evidence that the guidance rescission has not dampened the use of Title IX to fight LGBT discrimination. Each of the cases, *Parents for Privacy v. Dallas School District No. 2*,¹⁷² *Doe ex rel. Doe v. Boyertown Area School District*,¹⁷³ *Adams ex rel. Kasper v. School Board of St. Johns County*,¹⁷⁴ and *J.A.W. v. Evansville Vanderburgh School Corporation*,¹⁷⁵ ultimately held that transgender students should have access to facilities that match their gender identity. Three of the four found that Title IX requires trans-affirmative bath- and locker-room policies,¹⁷⁶ while the fourth,

¹⁶⁵ *A.H. ex rel. Handling*, 290 F. Supp. 3d at 327.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).

¹⁶⁹ *See id.*

¹⁷⁰ *Id.* at 1040.

¹⁷¹ *Id.* at 1049–50.

¹⁷² 326 F. Supp. 3d 1075 (D. Ore. 2018).

¹⁷³ 897 F.3d 515 (3d Cir. 2018), *revising* *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 893 F.3d 179 (3d Cir. 2018).

¹⁷⁴ 318 F. Supp. 3d 1293 (M.D. Fla. 2018).

¹⁷⁵ 323 F. Supp. 3d 1030 (S.D. Ind. 2018).

¹⁷⁶ *See J.A.W.*, 323 F. Supp. 3d at 1037 (indicating that there are situations where “Title IX requires a school to permit a transgender student to use the restrooms that coincide with his gender identity”); *Adams*, 318 F. Supp. 3d at 1325 (finding a Title IX violation where a School Board prohibited “a transgender boy, from using the boys’ restroom”); *Parents for Privacy*, 326 F. Supp. 3d at 1106 (finding that “[f]orcing transgender students to use facilities inconsistent with their gender identity would undoubtedly harm those students and prevent them

Boyertown Area School District, punted the question of Title IX's requirements for trans students.¹⁷⁷

Ultimately, in light of recent cases, it is clear that the 2017 guidance rescission is essentially innocuous, and that Title IX can still be used as a tool to protect transgender students from discriminatory school policies.

III

"DENIED THE BENEFITS OF"

This Part begins by examining one of the Supreme Court's influential cases on Title IX violations, *Davis v. Monroe*.¹⁷⁸ Using terminology drawn from *Davis*, this Part then presents a study of Supreme Court cases in order to elucidate the contours of what it means to "deprive" in the Title IX context, and it formulates a coherent definition of the "benefits" of an education opportunity. Against this framework, this Part finally demonstrates the American public educational system's ubiquitous failure to ensure that queer students receive benefits equal to their non-queer counterparts.

A. *Davis v. Monroe*'s Unresolved Questions

In *Davis v. Monroe*, the Supreme Court examined whether peer-on-peer harassment provided grounds for a private cause of action under Title IX.¹⁷⁹ The case arose from facts involving LaShonda Davis, a fifth-grade student at Hubbard Elementary School.¹⁸⁰ Starting in December 1992, G.F.—a classmate of LaShonda's, began sexually harassing her by touching her and by making inappropriate comments.¹⁸¹ Over the next month, G.F.'s inappropriate conduct continued and was reported to

from equally accessing educational opportunities and resources" and would constitute sex-stereotyping in violation of Title IX).

¹⁷⁷ It should be noted that *Boyertown* is a revised version of an earlier opinion that explicitly endorsed the notion that Title IX requires granting trans-students access to facilities in line with their gender identity. See *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 536 (3d Cir. 2018) (finding that a policy that barred transgender students from using facilities in line with their gender identity would violate Title IX); Chan Tov McNamara, *Repeated Victories in the "Bathroom Wars" During Summer 2018*, 2018 LGBT L. NOTES 405, 406–407, <https://lgbtbarny.org/wp-content/uploads/2018/09/2018-September-Law-Notes.pdf> [<https://perma.cc/BG43-E6ME>] (documenting reasons for the revision).

¹⁷⁸ *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 632–33 (1999).

¹⁷⁹ *Id.* at 633.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

LaShonda's mother and classroom teacher, who assured that the school principal had been notified.¹⁸²

Over the next four months, G.F.'s pattern of sexual harassment continued towards LaShonda.¹⁸³ She repeatedly reported the incidents to her mother and multiple teachers.¹⁸⁴ Finally, in mid-May, G.F. was charged with sexual battery.¹⁸⁵

In light of months of harassment, LaShonda's family brought a suit alleging that no disciplinary action had been taken against G.F. and that the Monroe County Board of Education (Education Board) had failed to properly instruct school personnel on dealing with student sexual harassment.¹⁸⁶ Specifically, the complaint alleged that the Board had failed its Title IX obligations because "[t]he persistent sexual advances and harassment by the student G.F. upon [LaShonda] interfered with her ability to attend school and perform her studies and activities,"¹⁸⁷ and "[t]he deliberate indifference by Defendants to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abus[ive] school environment."¹⁸⁸

Considering the facts of the case, the Supreme Court held that the petitioners could bring a private cause of action under Title IX, since the Education Board had acted with deliberate indifference to the known acts of harassment within the school.¹⁸⁹ However, the Court confined the holding, stating that an action would only exist for harassment that is so "severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."¹⁹⁰ The Court further clarified that a deprivation of educational benefits was not restricted to cases of physical exclusion.¹⁹¹ Instead, an action that "undermines and detracts from the victims' educational experience" could also prove to violate Title IX requirements.¹⁹²

182 *Id.* at 634.

183 *Id.*

184 *Id.*

185 *Id.*

186 *See id.* at 635.

187 *Id.* at 636 (alterations in original).

188 *Id.* (alterations in original).

189 *Id.*

190 *Id.* at 650.

191 *Id.* at 651.

192 *Id.*

In addition to demonstrating Title IX's substantive equality underpinnings,¹⁹³ the *Davis* decision illuminates the Court's definition of a Title IX violation: the victim's *deprivation of equal access to some educational opportunity or benefit on the basis of sex*.¹⁹⁴ However, the Court's use of the term "benefit" remained vague because the Court failed to announce an explicit definition.¹⁹⁵ Two questions then remain: when can it be said that a student has been deprived of equal access to the benefits of education? And, in the context of an educational opportunity, what constitutes a benefit?

B. Analysis—When Is a Student Deprived of Equal Access to the Benefits of an Educational Opportunity?

To properly analyze this question, this Note collects Supreme Court cases by using the term "educational opportunity" to identify the relevant cases. This generated a list of forty-one cases, which spanned over fifty years (1954–2017).¹⁹⁶ Then, the cases were divided based on the central topic or element, including: (1) race; (2) gender classifications; (3) disabilities; and (4) nationality.¹⁹⁷ Afterwards, this Note analyzes the factors the Court used to determine when equal access to an educational opportunity was given or denied.

This analysis determines that the Court has concluded that students were deprived equal access to the benefits of an educational opportunity when: (a) despite equal access to tangible resources, the institution imposes feelings of inferiority or stigma upon the student; (b) despite equal access to tangible resources and instruction, the institution deprives a student of an equal opportunity to achieve their higher goals; and (c) an institution fails to provide affirmative interventions for a student whose personal circumstances prevent them from accessing most, or all of the resources the institution provides their cohorts.¹⁹⁸

¹⁹³ See Cohen, *supra* note 39, at 266 ("*Davis* represents a theory of substantive equality at odds with the constitutional theory of formal equality. . . . Schools are not required merely to treat similarly situated students alike; rather, they must work to remedy sexual harassment.").

¹⁹⁴ See *Davis*, 526 U.S. at 653.

¹⁹⁵ *Id.*

¹⁹⁶ See *infra* app.

¹⁹⁷ See *infra* app.

¹⁹⁸ See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 n.8 (1982); *Lau v. Nichols*, 414 U.S. 563, 568 (1974); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

1. *Educational Opportunities in Cases Involving Race*

The Supreme Court's cases on educational opportunities and race begin with a focus on school segregation, then later move to affirmative action.¹⁹⁹ The principles revealed in this line of cases are twofold: (1) equal access to the benefits of educational opportunities may be barred despite access to equal tangible resources; and (2) students are deprived equal benefits of educational opportunities where an institution imposes feelings of inferiority or stigma upon them.²⁰⁰

In the segregation cases, the Court reveals that the notion of "educational benefits" incorporates "intangible considerations,"²⁰¹ including the psychological well-being of students.²⁰² Hence, if an educational system serves to stigmatize or impose feelings of inferiority upon a class of students, equal access to the benefits of an educational opportunity has been denied.²⁰³

Consider *Brown v. Board of Education*, the landmark case on school desegregation.²⁰⁴ There, the Court dismissed the use of equal facilities in segregated schools—which, presumably, would satisfy formal equality.²⁰⁵ Instead, the majority found that Black students were denied equal benefits of educational opportunities because of segregation's psychological impact.²⁰⁶ By separating students, segregation imposed "a feeling of inferiority as to [African American students'] status in the commu-

¹⁹⁹ See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 189 (1973); *Spencer v. Kugler*, 404 U.S. 1027, 1027 (1972); *Dandridge v. Jefferson Parish Sch. Bd.*, 404 U.S. 1219, 1219 (Marshall, Circuit Justice 1971); *Oregon v. Mitchell*, 400 U.S. 112, 133 (1970); *Gaston Cty. v. United States*, 395 U.S. 285, 287 (1969); *Rogers v. Paul*, 382 U.S. 198, 198–99 (1965); *Brown*, 347 U.S. at 483 (1954).

²⁰⁰ See, e.g., *Brown*, 347 U.S. at 493 ("Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."); *id.* at 494 (finding that a sense of inferiority generated by the separation tends to permanently retard the educational and mental development of the affected students and thus deprive them of benefits they would receive in an integrated school system).

²⁰¹ *Id.* at 493.

²⁰² Cf. *id.* at 493 ("Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to *adjust normally* to his environment." (emphasis added)).

²⁰³ See, e.g., *Norwood v. Harrison*, 413 U.S. 455, 468–71 (1973) (finding a private school served an "important educational function," which was undermined by the school's discriminatory treatment of interracial couples because "discriminatory treatment exerts a pervasive influence on the entire educational process"); cf. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472–73 (1982) ("[M]inority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community.").

²⁰⁴ *Brown*, 347 U.S. at 483.

²⁰⁵ *Id.* at 488.

²⁰⁶ *Id.* at 494.

nity that may affect the hearts and minds in a way unlikely ever to be undone.”²⁰⁷ In the Court’s opinion, these feelings of inferiority affected Black students’ motivation to learn, and therefore impaired “the educational and mental development of negro children . . . depriv[ing] them of some of the benefits they would receive in a racial[ly] integrated school system.”²⁰⁸

2. *Educational Opportunities in Cases Involving Gender*

The Supreme Court’s gender and education cases establish that students are deprived of equal access to the benefits of educational opportunities when despite equal access to tangible resources and instruction, the institution deprives a student of an equal opportunity to achieve their higher goals.²⁰⁹

In *Mississippi University for Women v. Hogan* for instance, the Supreme Court evaluated whether a public state university’s admission policy of denying males the right to enroll for credit violated the Equal Protection Clause.²¹⁰ In 1979, the respondent Joe Hogan applied for admission to enroll in the university’s Nursing Baccalaureate program.²¹¹ Though a qualified registered nurse, Hogan was denied admission on account of his sex.²¹² Despite denying Hogan admission, the school told Hogan that he and other men, could audit the university’s classes but would not be allowed to enroll for credit.²¹³ As such, however, Hogan was deprived of the ability to receive a baccalaureate degree in nursing.²¹⁴ Analyzing the facts of the case, the Court concluded that the state had failed to establish an “exceedingly persuasive justification” for the policy’s gender-based classification and the policy was therefore unconstitutional.²¹⁵

The most significant aspect of *Mississippi University for Women* was that Hogan had access to equal instruction, and yet the Court found that he had been denied equal access to the benefits of an educational opportunity.²¹⁶ From the facts of the case, men were allowed to audit all the classes offered at

²⁰⁷ *Id.* at 494 (quoting *Brown v. Bd. of Educ.*, 98 F. Supp. 797, 798 (D. Kan. 1951)).

²⁰⁸ *Id.* (second alteration in original).

²⁰⁹ See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 n.8 (1982).

²¹⁰ *Id.* at 719.

²¹¹ *Id.* at 720.

²¹² *Id.* at 721.

²¹³ *Id.*

²¹⁴ *Id.* at 720.

²¹⁵ *Id.* at 732.

²¹⁶ *Id.*

the Nursing School.²¹⁷ Arguably then, Hogan had access to the benefits that the female students had; he would be able to get taught by the same professors, read and study the same materials, all while not paying the same tuition.²¹⁸ Nevertheless, Hogan ultimately could not receive his baccalaureate degree—thereby depriving him the ability to advance his career.²¹⁹ By finding that Hogan was denied “unique benefits,”²²⁰ the Supreme Court indicated that deprivation of access to the benefits of education was more than limiting or restricting access to the same classes or instruction as the other students.²²¹ Instead, deprivation may include limiting a student’s access to the same ability to achieving their higher goals as their peers.²²²

3. *Educational Opportunities in Cases Involving Students with Disabilities*

The cases examining students with disabilities establish two principles: 1) students are deprived of equal access to educational opportunities when institutions do not provide special remedial services; and 2) the remedial services provided do not have to ensure equal outcomes, but instead must be designed to ensure the student maximizes the student’s individual potential.

In *Board of Education of the Hendrick Hudson Central School District v. Rowley ex rel. Rowley*,²²³ the Supreme Court considered whether a New York public school’s denial of a qualified sign-language interpreter in all of a student’s classes denied her the benefits of a “free appropriate public education” guaranteed under the Education for All Handicapped Children Act of 1975.²²⁴ The facts involved Amy Rowley, a deaf first-grade student.²²⁵ At the beginning of her first year, Amy’s parents requested that she be provided a full-time, sign-language interpreter.²²⁶ Evaluations from the school and an independent examiner both found that Amy did not need such assistance, and in fact, she “was achieving educationally, academically, and socially” without it.²²⁷ Nevertheless, Amy’s

²¹⁷ *Id.* at 721.

²¹⁸ *See id.* at 721 & n.4.

²¹⁹ *See id.* at 723 & n.8.

²²⁰ *Id.*

²²¹ *See id.* at 721 & n.4.

²²² *See id.* at 723 & n.8.

²²³ 458 U.S. 176 (1982).

²²⁴ 20 U.S.C. § 1401(9) (2012).

²²⁵ *Rowley*, 458 U.S. at 184.

²²⁶ *Id.*

²²⁷ *Id.* at 185.

parents insisted that failure to provide a sign-language interpreter was a denial of a free appropriate public education.²²⁸

The Court disagreed, finding that Amy had been provided sufficient services, calculated to meet her educational needs.²²⁹ In his concurrence, Justice Blackmun specified that sufficient services were given where the “program, *viewed as a whole*, offered . . . an opportunity to understand and participate in the classroom that was substantially equal to that given [to] . . . nonhandicapped classmates.”²³⁰

Rowley’s reasoning demonstrates distinctive substantive equality principles. First, the Court established that to provide equal access to educational benefits institutions may have to provide remedial services for students with limited capabilities.²³¹ Such remedial services are an exemplar of the affirmative interventions substantive equality requires.²³² Secondly, the Court provides that these services do not have to ensure equal outcomes, rather they should be designed to maximize the individual student’s potential.²³³ This demonstrates two tenets of substantive equality: a consideration of an individual’s substantive circumstances and the removal of innate barriers.²³⁴

4. *Educational Opportunities in Cases Involving Nationality*

Similarly, the Supreme Court’s cases examining nationality reaffirm the role of affirmative interventions.²³⁵ They establish that a student has been deprived of equal access to an educational opportunity where a student’s differences or special circumstances completely prevent them from receiving equal benefits from an educational opportunity.²³⁶ In these cases, a school is required to implement affirmative interventions.²³⁷

²²⁸ *Id.* at 186.

²²⁹ *Id.* at 210.

²³⁰ *Id.* at 211 (Blackmun, J., concurring).

²³¹ *See id.* at 189.

²³² *See supra* notes 49–53 and accompanying text.

²³³ *See* Bartlett, *supra* note 61, at 5 (“Substantive equality theory focuses on outcomes, but does not necessarily require identical or mirror-image outcomes. Some substantive equality advocates favor equal treatment in some situations and special accommodation in others . . .”).

²³⁴ *See supra* subpart I.A.

²³⁵ *See, e.g.,* Lau v. Nichols, 414 U.S. 563, 568 (1973).

²³⁶ *See id.*

²³⁷ *Id.*

In one such case, *Lau v. Nichols*, the Court scrutinized a language barrier preventing foreign-born students from receiving equal benefits from a public school education.²³⁸ In *Lau*, the Court examined whether the San Francisco school system's failure to provide remedial English language instruction to foreign-born students, lessened their ability to receive educational benefits equivalent to those received by their English-speaking, American-born cohorts.²³⁹ The Court reasoned that because educational programs were conducted solely in English, the Chinese minority "receiv[ed] fewer benefits than the English-speaking majority," thereby denying them the "meaningful opportunity to participate in the educational program."²⁴⁰ To ameliorate this issue, the Court held that the San Francisco school district had to take affirmative steps in order to rectify the Chinese student's language deficiency.²⁴¹

The Supreme Court's reasoning in *Lau* implies that the Chinese students' own language barrier effectively denied them the benefits of the instructional program.²⁴² This can be interpreted to mean that a student's own deficiencies or differences can hamper the student's ability to receive the benefits of an education, regardless of whether the benefit is offered equally. Further, the Court's holding requiring the school system to provide remedial lessons indicates that schools may have to take affirmative steps with respect to a specific group of students for them to equally receive the benefits provided by the educational opportunity.²⁴³

C. Defining the "Benefits" of an Educational Opportunity

In the cases explored, the Court has used the term "benefits" in a wide range of dissimilar situations.²⁴⁴ Recall that in *Davis* the court noted that a decline in LaShonda's academic performance "provide[d] necessary evidence" that she was de-

²³⁸ *Id.* at 564.

²³⁹ *Id.* at 565.

²⁴⁰ *Id.* at 568.

²⁴¹ *Id.*

²⁴² *Id.* at 568.

²⁴³ *Id.* at 566 ("[T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.").

²⁴⁴ See *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (academic instruction); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 721 (1982) (opportunity to pursue higher education); *Bd. Of Educ. v. Rowley ex rel. Rowley*, 458 U.S. 176, 179 (1982) (remedial services); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (psychological well-being).

nied equal access to the benefits of the educational program,²⁴⁵ implying that the term “benefits” could refer to academic instruction and performance.²⁴⁶ By contrast, in *Brown*, the court used the term “benefit” to refer to feelings of psychological wellbeing and mental development gained at educational institutions.²⁴⁷ And further, in *Mississippi University for Women*, the term “benefits” referred to the opportunity to pursue one’s higher goals.²⁴⁸

The regulations designed to clarify Title IX’s application and scope are similarly vague and open ended. For example, 34 C.F.R. § 106.31’s only suggested definition of “benefit,” includes “any right, privilege, advantage, or opportunity” and any “aid, benefit, or service.”²⁴⁹ This again fails to clearly limit the definition of “benefits” in any way.

In sum, there appears to be no limited definition of the benefits of an educational opportunity. This failure to define the term has allowed courts to apply Title IX protection to a wide array of educational disparities, and moreover address “a wide range of *intentional* unequal treatment.”²⁵⁰

In Title IX practice, this indefiniteness has allowed courts to interpret the term “benefits” broadly; using it to refer to any opportunity, advantage, profit, or gain that a judge finds an educational institution offers students. And with regards to LGBT students in particular, the open-endedness of the term has allowed courts to address a wide range of anti-LGBT institutional policies. Most recently, for instance, in *Board of Education v. U.S. Department of Education*, a court held that “access to a communal school bathroom constitutes an ‘aid, benefit[], or service[]’ or a ‘right, privilege, advantage, or opportunity,’”²⁵¹ for Title IX purposes.

D. Have Queer Students Been Denied the Benefits of Educational Opportunities?

This section pauses to offer three vignettes. In doing so, the aims are twofold: (1) They illustrate a number of ways in which queer students are denied the benefits of education; and

²⁴⁵ *Davis*, 526 U.S. at 651.

²⁴⁶ *Id.*

²⁴⁷ See *supra* notes 205–208 and accompanying text.

²⁴⁸ See *supra* notes 209–222 and accompanying text.

²⁴⁹ 34 C.F.R. § 106.31(b) (2018).

²⁵⁰ *Vinova v. Henry Cty. Bd. of Educ.*, No. 15-37-GFVT, 2016 WL 4993389, at *13 (E.D. Ky. Sept. 15, 2016).

²⁵¹ *Bd. of Educ. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 865 (S.D. Ohio 2016) (alterations in original).

(2) they demonstrate how a substantive equality approach to Title IX is better able to effectively help queer students. Under the framework and definitions distilled prior,²⁵² all three students have been denied some benefits of an educational opportunity. Now, consider the following vignettes of Ashley, Leon, and Mark.²⁵³

1. *Vignette One—Ashley*

Ashley is an 8-year-old third grader with Gender Dysphoria.²⁵⁴ Assigned male at birth, Ashley identifies as female. To affirm her gender identity, Ashley asks her friends and teachers to call her “Ashley.” Her friends oblige, however, Ashley’s homeroom teacher refuses to call her by her new name or refer to her using female pronouns.²⁵⁵ Instead, Ashley’s homeroom teacher insists on referring to students by the name and gender listed on their birth certificate.²⁵⁶

²⁵² See *supra* subparts III.B and III.C.

²⁵³ For the most part, these vignettes are works of fiction, based loosely on my own experiences or experiences shared with me by friends. Where I have borrowed from actual instances of anti-LGBT student discrimination, I have cited to corresponding cases or articles.

²⁵⁴ See *supra* note 3 and accompanying text.

²⁵⁵ In recent years this has occurred with increasing frequency. See, e.g., Carlos Granda, *Family of Transgender Student, 8, Files Discrimination Suit Against School*, ABC 7 CHI. (Aug. 4, 2017), <https://abc7chicago.com/family-of-transgender-student-8-files-discrimination-suit-against-school/2275378/> [<https://perma.cc/7LXV-XD8Q>]; Eli Rosenberg & Moriah Balingit, *A Teacher Refused to Use Transgender Students' Names. His Resignation Was Just Approved.*, WASH. POST (June 11, 2018), <https://www.washingtonpost.com/news/education/wp/2018/06/11/a-teacher-refused-to-use-transgender-students-names-his-resignation-was-just-approved/> [<https://perma.cc/99Z3-KXK8>]; Justin Worland, *Teacher Says She Was Fired for Refusing to Use Male Name for Transgender Student*, TIME (Nov. 11, 2015), <http://time.com/4108948/texas-teacher-transgender-girl/> [<https://perma.cc/L8S8-GTFW>]; *Shots in a Classroom*, ABC NEWS (Oct. 7, 2011), <https://abcnews.go.com/2020/video/shots-classroom-14694384> [<https://perma.cc/WG2S-3CV7>] (noting a teacher’s refusal to call a transgender student by her preferred name).

Surprisingly, the Trump Administration’s Department of Education has recently released guidance documents acknowledging that misgendering or misnaming a transgender student can constitute harassment under Title IX. See Letter from Candice Jackson, Acting Assistant Sec’y for Civil Rights, Office for Civil Rights, to Regional Directors (June 6, 2017), <https://www.documentcloud.org/documents/3866816-OCR-Instructions-to-the-Field-Re-Transgender.html> [<https://perma.cc/S6WE-EYEA>] (describing the refusal to use a transgender student’s preferred name as “hostility based on sex or sex-stereotyping”).

²⁵⁶ Many states refuse to amend birth certificates unless transgender persons have undergone gender-affirming surgery. Consequently, transgender students are disparately impacted. Statistics indicate that some 76% of transgender individuals do not have a birth certificate that matches their gender identity. See JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 143 (2011), <https://www.hivlawandpolicy.org/sites>

After discussing her gender identity and her desire to live as a female with school authorities, Ashley's parents were told that she would have to use single-stall bathrooms rather than the girls room.²⁵⁷ No other students use the single-stall bathrooms, and whenever Ashley must use them she feels singled out and inferior to her peers.

In this vignette, Ashley's school has deprived her of the benefits of an educational opportunity by imposing feelings of stigma and inferiority upon her—akin to the manner discussed in the Supreme Court cases examining race.²⁵⁸ First, the teacher's insistence on misgendering and misnaming Ashley is both demeaning and dehumanizing.²⁵⁹ In fact, purposefully misgendering transpersons is widely considered psychological abuse,²⁶⁰ and misnaming transgender youth is associated with increased levels of depression and suicidal behavior.²⁶¹ Secondly, by restricting Ashley from using the bathroom in line with her gender identity, the school has both further stigma-

/default/files/Injustice%20at%20Every%20Turn.pdf [https://perma.cc/MWJ5-CZNH].

²⁵⁷ This vignette is based, in part, on the facts of a recent case brought because an eight-year-old transgender student was barred from using the girls' bathroom. See *A.H. ex rel. Handling v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 324–25 (M.D. Pa. 2017).

²⁵⁸ See *supra* notes 205–08 and accompanying text.

²⁵⁹ See, e.g., Robin Dembroff & Daniel Wodak, *He/She/They/Ze*, 5 ERGO 371, 376 (2018) (writing that intentional and unintentional misgendering can result in “serious physical and psychological health problems”); Stephanie Julia Kapusta, *Misgendering and Its Moral Contestability*, 31 HYPATIA 502, 502 (2016) (describing misgendering as a “harmful, oppressive, and contestable practice”); Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences with Misgendering*, 3 STIGMA & HEALTH 53, 58 (2018) (noting transgender individuals find misgendering “stigmatizing” and psychologically distressing); Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 SELF & IDENTITY 51, 53 (2015) (finding a correlation between frequency of misgendering and negative views of self); Remy Fisher, *Intentionally Misgendering Transgender People Is Considered Violence*, AFFINITY MAG. (Apr. 17, 2017), <http://affinitymagazine.us/2017/04/17/intentionally-misgendering-transgender-people-is-considered-violence/> [https://perma.cc/S52T-TXPH] (describing misgendering as “dehumanizing”); Joli St. Patrick, *What You're Really Saying When You Misgender*, BODY IS NOT AN APOLOGY (May 26, 2017), <https://thebodyisnotanapology.com/magazine/what-youre-really-saying-when-you-misgender/> [https://perma.cc/SC7U-6QPF] (explaining the impact of misgendering).

²⁶⁰ See, e.g., Lucian Clark, *Misgendering Is Violence*, GENDER TERROR (Jan. 30, 2014), <https://genderterror.com/2014/01/30/misgendering-is-violence/> [https://perma.cc/U3Q7-VGDB] (describing misgendering as “a deliberate act to cause harm, pain, and suffering”); Fisher, *supra* note 259 (arguing that misgendering falls within the World Health Organization's definition of violence).

²⁶¹ See Stephen T. Russell et al., *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth*, 63 J. ADOLESCENT HEALTH 503, 503–04 (2018).

tized Ashley and deprived her of an opportunity which her non-queer peers receive.²⁶²

When educational institutions stigmatize or cause students to feel inferior, this not only harms them psychologically but also deprives them of an equal educational opportunity.²⁶³ As the Court noted in *Brown*, one of the “benefits” of an educational opportunity is helping a child develop a positive sense of self and grow into a well-adjusted adult.²⁶⁴ Because she faces misgendering, misnaming, and exclusion from facilities in line with her gender identity, Ashley has undeniably been deprived a benefit based upon her sex—violating her Title IX rights.²⁶⁵

Under a formal equality approach, there may not be any Title IX solutions to the harassment Ashley faces from her teacher, or her restriction to a single-stall bathroom. If Ashley’s homeroom teacher treats all students equally—by using the name and genders on all their birth certificates—then formal equality has been achieved.²⁶⁶ Ashley has been treated just the same as any other student, regardless of the student’s gender. In addition, if the school’s policy is to limit a student’s bathroom use to the gender markers on the student’s birth certificate, then formal equality will also not solve the discriminatory impact of the rule.²⁶⁷

On the other hand, a substantive equality approach to Title IX takes into consideration Ashley’s circumstances, and can protect her from her teacher’s behavior and institutional discrimination. Under a substantive equality model—one that ensures equality of outcomes—Title IX can ensure Ashley receives the same benefit that other students receive: psychological wellbeing. As such, a substantive equality approach to Title IX would ensure that Ashley was neither misnamed nor misgendered, and that she was free to use the bathroom of her choosing.

²⁶² Recall that *Bd. of Educ. v. U.S. Dep’t of Educ.* found that restricting a trans student’s bathroom access constitutes straightforward deprivation of an educational benefit, under the definition of benefit as “any right, privilege, advantage, or opportunity.” See *supra* note 251 and accompanying text.

²⁶³ See *supra* notes 178–95 and accompanying text.

²⁶⁴ See *supra* notes 204–08 and accompanying text.

²⁶⁵ Cf. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (psychological harms).

²⁶⁶ Under the “sameness-of-treatment” solutions of formal equality, she has been treated the same. See *supra* notes 38–53 and accompanying text. Recently, a School District seeking to bar a transgender student from access to the restrooms in line with his gender identity made this exact argument. See *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1037 (S.D. Ind. 2018).

²⁶⁷ See *supra* notes 38–53 and accompanying text.

2. Vignette Two—Leon

Leon is a 17-year-old, gay male in his final semester of high school. Because of his sexuality, Leon has always found school difficult and demeaning. Every day, Leon faces incessant torment from his peers. Because of his feminine mannerisms, Leon's peers relentlessly bully him, using homophobic slurs like "fag," "homo," and "sissy."²⁶⁸ Leon has tried to discuss the bullying with his teachers and school counselor, but neither were very helpful.²⁶⁹ The school guidance counselor said he was not trained to deal with "those types of issues."²⁷⁰ Leon's principal went as far as to say, "boys will be boys," and suggested Leon would not face bullying if he "manned up."²⁷¹

In his weekly sexual education class, Leon feels like a pariah. Because of "no-promo-homo" laws, Leon's sex-ed teacher cannot discuss sexual health topics that are relevant to Leon as a gay adolescent.²⁷² Instead, under state law, Leon's teacher is required to emphasize that "homosexual conduct is not an acceptable lifestyle" and that homosexual conduct is a criminal offense under the Penal Code.²⁷³

At the end of the semester, Leon is excited about attending his senior prom. When Leon tells one of his teachers about his intention to bring a same-sex date to prom, he is

²⁶⁸ Anti-queer bullying is omnipresent in education. Over 85% of LGBT students have experienced verbal harassment ("called names [or] threatened"), and over 25% have experienced physical harassment at school because of their sexuality or gender identity. JOSEPH G. KOSCIW ET AL., GLSEN, THE 2015 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION'S SCHOOLS 22–23 (2016), https://www.glsen.org/sites/default/files/2015%20National%20GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report_0.pdf [<https://perma.cc/YM82-QNC9>].

²⁶⁹ See generally HUMAN RIGHTS WATCH, "LIKE WALKING THROUGH A HAILSTORM": DISCRIMINATION AGAINST LGBT YOUTH IN US SCHOOLS 49 (2016), https://www.hrw.org/sites/default/files/report_pdf/uslgbt1216web_2.pdf [<https://perma.cc/L8B7-Z8AG>] ("None of the states surveyed required counselors to be trained on sexual orientation or gender identity, leaving it up to individual counselors to seek out cultural competency training on LGBT issues.").

²⁷⁰ See *id.*

²⁷¹ *Id.* at 22; see also *Nabozny v. Podlesny*, 92 F.3d 446, 454–55 (7th Cir. 1996) (stating that the court would "find it impossible to believe that a female lodging a similar complaint [of simulated rape] would have received the same response [as the male victim]" of "boys will be boys").

²⁷² "No Promo Homo" laws refer generally to state and local efforts to restrict teachers from discussing LGBT related topics in the classroom. See generally Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461 (2017) (proposing a national campaign to repeal or overrule anti-gay curriculum laws, or "no promo homo" laws, which, according to the author, violate equal protection).

²⁷³ *Id.*; TEX. HEALTH & SAFETY CODE ANN. §§ 85.007(b)(2), 163.002(8) (West 2017).

immediately reprimanded. Later, Leon receives an email from the principal that states that he will be physically excluded from his senior prom if he arrives with a male date. No other seniors bringing opposite-sex dates are similarly instructed.²⁷⁴

In this vignette, Leon has been deprived the benefits of an education because of his school's failure to ameliorate the homophobic bullying,²⁷⁵ his sexual education class's failure to provide him with an equal educational advantage, and his school's prom-date ultimatum that unequally deprived him of the right to bring a date of his choice.²⁷⁶

First, if Leon's school can provide other students with counseling services, then the counselor's lack of training and subsequent inability to deal with Leon's situation (i.e. homophobic bullying), has undoubtedly deprived Leon of a service that other students have freely received.

Second, if a sexual education class's purpose is to provide a constructive atmosphere where "pupils learn about their developing sexuality,"²⁷⁷ provide a platform for students to develop a "positive and respectful approach to sexuality and sexual relationships,"²⁷⁸ and "reduce adolescent sexual risk

²⁷⁴ These aspects are based upon the Title IX case against Christian Brothers High School (CBHS) for prohibiting a student from bringing a same-sex date to a homecoming dance. See Emma Margolin, *Gay Student Sues School After He Couldn't Bring Boy to Homecoming*, NBC NEWS (Sept. 21, 2016, 5:13 PM), <https://www.nbcnews.com/feature/nbc-out/gay-student-sues-school-after-he-couldn-t-bring-boy-n652151> [https://perma.cc/D68V-L59X]; see also Complaint, *Sanderson v. Christian Bros. Lasalle High Sch.*, No. 2:16-cv-02815 (W.D. Tenn. Sept. 20, 2016).

²⁷⁵ See Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, 128 (2000) ("While 'authorities react instantly to racist terms' and profanity, 97% of anti-gay slurs go unchallenged. This discrepancy creates an environment where gay students' educational experiences are drastically different from those of their classmates, hampering their educational opportunities." (citing Ann Rostow, *Hostile Hallways: As Schools Ignore Antigay Harassment, Some Lesbians are Fighting Back*, GIRLFRIENDS, June 1999, at 30, 31)).

²⁷⁶ See Letter from Paul D. Castillo, Senior Attorney, Lambda Legal, to Joe Dyar, Superintendent, Calhoun Cty. Sch. Dist. and Mack Holley, Principal, Alexandria High Sch. 1 (Feb. 8, 2018) [hereinafter Castillo Letter], https://www.lambdalegal.org/in-court/legal-docs/al_20180208_letter-to-calhoun-county-school-district [https://perma.cc/FF35-W7T2] (demonstrating that barring same-sex high school students from attending school social functions violates Title IX).

²⁷⁷ Bryony Brooks, *Sex Education in Secondary Schools*, 15 HEALTH EDUC. RES. 506, 506–08 (2000) (book review).

²⁷⁸ Herman P. Schaalma et al., *Sex Education as Health Promotion: What Does it Take?*, 33 ARCHIVES SEXUAL BEHAV. 259, 259 (2004).

behaviors,”²⁷⁹ then it is clear that the state’s no-promo-homo laws have denied Leon these benefits. Moreover, because the law specifically requires teachers to affirmatively emphasize that homosexuality is both unacceptable and criminal, Leon has been marginalized²⁸⁰—further depriving him of the intangible benefits of affirmation and psychological well-being the Court discussed in its cases regarding race.²⁸¹

Finally, Leon has been deprived of a benefit in the sense that he was to be physically barred from entering the prom with a male date. As demonstrated, under the “sex discrimination per se” approach to extending Title IX, sex discrimination occurs when a student is punished for behavior considered acceptable when undertaken by the opposite sex.²⁸² Viewed in this way, physically excluding Leon from prom for bringing a male date, is in fact depriving him of a benefit provided by an educational opportunity; his Title IX rights have been violated because a similarly situated female student could attend prom with a male date free of consequences.²⁸³

In Leon’s case, formal equality will likely fail to amend any of the Title IX violations that he faces. Here, his counselor’s lack of training on LGBT issues similarly affects all students. That is, any student whether LGBT or not will receive little help against anti-LGBT bullying. Because LGBT students, in this instance Leon, require additional—and in some cases different—counseling services than the heterosexual-cisgender majority,²⁸⁴ the formal equality model fails to meet their needs,

²⁷⁹ Douglas B. Kirby et al., *Sex and HIV Education Programs: Their Impact on Sexual Behaviors of Young People Throughout the World*, 40 J. ADOLESCENT HEALTH 206, 206 (2007).

²⁸⁰ *Id.* at 207; see also Amanda Harmon Cooley, *Constitutional Representations of the Family in Public Schools: Ensuring Equal Protection for All Students Regardless of Parental Sexual Orientation or Gender Identity*, 76 OHIO ST. L.J. 1007, 1026–28 (2015) (discussing the harms of no-promo-homo laws to LGBT students and the children of LGBT families).

²⁸¹ See *supra* notes 199–208 and accompanying text.

²⁸² See *supra* notes 135–47 and accompanying text.

²⁸³ Consider also that in *Davis* the Court noted that physical exclusion may deprive students of the benefits of educational opportunities. See *supra* note 191 and accompanying text.

²⁸⁴ For example, LGBT high school students are at significantly higher risk of substance abuse, sexually risky behavior, and depression. See Michael P. Marshal et al., *Sexual Orientation and Adolescent Substance Abuse: A Meta-Analysis and Methodological Review*, 103 ADDICTION 546, 550 (2008); Margaret Rosario et al., *A Model of Sexual Risk Behaviors Among Young Gay and Bisexual Men: Longitudinal Associations of Mental Health, Substance Abuse, Sexual Abuse, and the Coming-Out Process*, 18 AIDS EDUC. & PREVENTION 444, 450 (2006); see also Karen M. Jordan, *Substance Abuse Among Gay, Lesbian, Bisexual, Transgender, and Questioning Adolescents*, 29 SCH. PSYCH. REV. 201, 203 (2000) (“The unique cir-

and thereby fails to equally provide them with the same advantages and opportunities as non-LGBT students. In comparison, under a substantive equality approach, counselors would receive additional training and provide additional services to meet the needs of LGBT students, thereby ensuring they receive the same benefits as their peers.

A formal equality approach to Title IX will similarly fail to amend Leon's deprivation of the benefits of sexual educational classes. Undoubtedly, Leon has received the exact same sexual education information and instruction as his non-gay peers. However, because of Leon's special circumstances (his sexuality), the restrictions on sex education fail to provide him with the same advantages as his heterosexual peers; a constructive atmosphere to learn about his developing sexuality.²⁸⁵

By contrast, a substantive equality approach can recognize that Leon is being deprived of a benefit of the educational opportunity, and adapt with a curriculum that incorporates information that Leon requires as a gay man.

3. *Vignette Three—Mark*

Mark is a 20-year-old, gay male who has just started university. During freshman orientation Mark was required to attend several lectures and workshops on sexual assault, but none discussed or addressed same-sex sexual assault.²⁸⁶ Mark's university offers Rape Aggression Defense (RAD) classes, however when Mark tries to register, he is told that the classes are only offered to women.²⁸⁷

cumstances of sexual minority youth contribute to their risk of substance abuse and require specialized responses from psychologists and other adults.").

²⁸⁵ This may also be interpreted through the reasoning in *Mississippi University for Women*, that is, a deprivation of a student's higher goals. In a sense, though Leon has received equal instruction, he has been deprived benefits that support his higher goals. Presumably, Leon would like to have healthy adult relationships. Therefore, failing to provide him with the necessary tools, while simultaneously providing them to his peers is evidence of the unequal benefits received.

²⁸⁶ See Michael Scarce, *Same-Sex Rape of Male College Students*, 45 J. AM. C. HEALTH 171, 172 (1997) ("Discussions of adult male rape are frequently absent in campus rape education and prevention programs because the general public and popular culture have traditionally viewed rape in a context of violence against women.").

²⁸⁷ See *Rape Aggression Defense (R.A.D.) Systems*, CAL. STATE U. MONTEREY BAY [hereinafter CSU R.A.D.] <https://csumb.edu/police/rape-aggression-defense-rad-systems> [<https://perma.cc/8JAY-B98Z>] ("The class is *only* offered to female (assigned, transgender, identify-as) CSUMB students, staff and faculty." (emphasis added)). This is a common occurrence. Many colleges and universities have rape defense classes that are either restricted to women or do not address same-

Later in the semester, Mark decides to attend a fraternity party. After hours of drinking, Mark is visibly intoxicated when a fraternity brother invites him upstairs to his room. There, despite Mark's protests and clearly drunken state, the fraternity brother initiates sex with him. Because the other man is stronger than him, and because Mark does not know how to defend himself, he is unable to get away.

When Mark tries to report the rape he is met with disbelief and ignorance: the on-campus police are insensitive toward Mark's report and suggest that Mark was responsible for the assault because he was gay;²⁸⁸ the university's Title IX coordinator has no male-specific or gender-neutral victim literature to offer Mark;²⁸⁹ and the university's medical professionals have received no training on caring for male survivors of rape.²⁹⁰ Mark is left victimized twice over; first by the assault, and then by the university's inadequacies.

sex sexual assault. Male LGBT students are usually not allowed to attend. See, e.g., E-mail from Curtis Galbreath, Officer, Franklin & Marshall Coll., to author (Jan. 22, 2014, 9:47 AM EST) (on file with *Cornell Law Review*) ("The Department of Public Safety is conducting Rape Aggression Defense class [sic] This is a free 12 hour self-defense class for women."); Ithaca Coll. Feminists United et al., *Commentary: Students Address Rape Aggression Defense Course*, ITHACAN (Aug. 26, 2015), <https://theithacan.org/opinion/commentary-students-address-rape-aggression-defense-course/> [<https://perma.cc/6WVB-P2HG>] ("We take issue with the program because it is exclusionary Only offering the course to women creates a false, heterosexual binary where women are the victims and men are the perpetrators."); *Rape Aggression Defense (RAD) Classes*, CORNELL C., <https://www.cornellcollege.edu/campus-safety/programs/RAD.shtml> [<https://perma.cc/2GHK-WF6E>] ("The majority of sexual assaults are committed by men against women. R.A.D. techniques are based on surprise and speed, and we as instructors cannot run the risk of giving the 'weapons' we are teaching our female students to a potential attacker."); S.A.F.E. (*Self-defense Awareness & Familiarization Exchange*), FRANKLIN & MARSHALL C., <https://www.fandm.edu/public-safety/services/s-a-f-e-self-defense-awareness-familiarization-exchange> [<https://perma.cc/32SA-CYQM>] ("The S.A.F.E. program is intended for *women only*. While we know anyone can experience harm, including sexual violence, our goal is to assist women, (the largest population who experience sexual violence) with risk reduction strategies." (emphasis added)). In some cases, while RAD classes are openly offered to women, men must specially request classes. See, e.g., *RAD Self Defense Courses*, U. PENN. DIV. PUB. SAFETY, <https://www.publicsafety.upenn.edu/safety-initiatives/rad-self-defense-courses/> [<https://perma.cc/4259-UBMX>] ("RAD classes for men are available by appointment only."). In other cases, institutions offer "Resisting Aggression with Defense" classes for men in place of Rape Aggression Defense classes. The latter does not address sexual violence and is geared toward general self-defense. See, e.g., *CSU R.A.D.*, *supra* note 287 (specifying that "[t]his program is designed to empower participants to make safer choices when confronted with aggressive behavior" without mentioning sexual assault specifically).

²⁸⁸ See Scarce, *supra* note 286, at 172.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

Mark's experiences demonstrate how LGBT students are denied the benefits of educational programs within the scope of sexual assault education, prevention, and care. Sexual assault orientation programs routinely fail to address same-sex rape and sexual assault,²⁹¹ and the free rape defense classes offered on campus are typically restricted to women.²⁹² Further, in the aftermath of sexual assault, universities often fail to provide queer students with services comparable to their cisgender-heterosexual counterparts.²⁹³ All these examples indicate that, as a gay student, Mark has been deprived of equitable "aid, benefit[s], or service[s]" that other students receive.²⁹⁴

LGBT students require specialized post-assault care.²⁹⁵ For example, post-assault counselors must be especially conscious to address unique issues faced by transgender victims²⁹⁶ and to not invalidate or erase the identity of bisexual students.²⁹⁷ Similarly, male same-sex rape kits must be administered differently,²⁹⁸ male victims may prefer not to have

²⁹¹ See *supra* notes 286–87 and accompanying text.

²⁹² Admittedly, a formal equality approach to Title IX may work in the example of Rape Defense Classes—that is, Mark was undoubtedly denied access to an educational program on account of his sex. Simply removing the sex restrictions on RAD classes may fix the Title IX violation. That example turns on whether RAD classes teach techniques that work in a gender-neutral manner, therefore working irrespective of victim and perpetrator gender.

²⁹³ See, e.g., Zoe Ridolfi-Starr, *Transformation Requires Transparency: Critical Policy Reforms to Advance Campus Sexual Violence Response*, 125 YALE L.J. 2156 (2016) (noting that many queer students "report that their school officials fail to appropriately respond to reports of sexual violence and harassment made by LGBTQ students and are more likely to mishandle these complaints or dismiss them altogether").

²⁹⁴ See *supra* notes 249–50 and accompanying text.

²⁹⁵ See Scarce, *supra* note 286, at 172; see also Sara B. Oswalt, *Don't Forget the "B": Considering Bisexual Students and Their Specific Health Needs*, 57 J. AM. C. HEALTH 557, 558–59 (2009) (discussing the failure to address the specific health needs of Bisexual students); Jeffrey L. Todahl et al., *Sexual Assault Support Services and Community Systems: Understanding Critical Issues and Needs in the LGBTQ Community*, 15 VIOLENCE AGAINST WOMEN 952, 955 (2009) ("LGBTQ survivors of sexual violence endure unique obstacles related to social attitudes and system responses."); *Victim Centered Care*, SEXUAL ASSAULT FORENSIC EXAM'RS, <https://www.safeta.org/page/VictimCenteredLGBTQ> [<https://perma.cc/WL97-LJHJ>] (listing recommendations for LGBT care).

²⁹⁶ See *Victim Centered Care*, *supra* note 295 (detailing specific post-assault treatment strategies for transgender and gender nonconforming victims of sexual assault).

²⁹⁷ See Oswalt, *supra* note 295, at 558 (discussing the unique mental health challenges of persons who identify as bisexual and emphasizing the importance for campus health services to recognize and validate bisexuality).

²⁹⁸ See Scarce, *supra* note 286, at 172.

female nurses,²⁹⁹ and gender neutral or male specific literature is preferred for male victims.³⁰⁰

In the present vignette, under a formal equality approach, Mark's specific needs as a gay male victim have not have been met. Yet, under a substantive equality approach to Title IX, Mark's specific needs would be considered and provided for; ensuring that he appropriately receives the specific health services he requires, and guaranteeing benefits equivalent to those received by his non-gay cohort.

In sum, the three vignettes analyzed represented only a few illustrations of the ways in which LGBT students are victimized, discriminated against, and deprived many of the benefits of educational programs. It is clear therefore that solutions utilizing a formal equality approach fail to comprehensively solve the issues LGBT students face.³⁰¹ Instead, by approaching Title IX violations with a view towards honoring the statute's substantive equality mandate, institutions will ultimately be better able to serve LGBT students.

IV

A MODEL OF QUEER STUDENT EQUITY

This Part completes this Note's thought experiment by describing examples where institutions have deprived LGBT students some benefits of educational opportunities, and suggesting how Title IX may be used to ensure substantive equality. For each level of education, this Part suggests illustrative

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ Taking a step back, it seems likely that formal equality arguments will not help solve the discrimination and issues that the queer community faces as a whole. Professor Libby Adler has aptly and artfully demonstrated this in an interrogation of formal equality strategies:

Will all of our legal problems be solved? Will whatever trouble remains be due to our own inherent oddity or moral inferiority? What will we say when we have formal equality, but our youth are still disproportionately homeless, in foster care, abusing substances and suicidal? What will we say when we have formal equality, but HIV or some as yet unknown sexually transmitted successor ravages some segment of our community? What will we say when we have formal equality, but—unable to afford crucial gender-affirming health care—the impoverished among us are still taking street quality hormones, injecting silicone, and subjecting themselves to arrest—including police and prison violence—after engaging in sex work and other criminal activity to survive and to pay for health-related needs? What will we say when we have formal equality, but somehow, subtly, and always with some accompanying rationale, we find ourselves more vulnerable than others to allegations of obscenity, sexual impropriety, or predation?

Adler, *Gay Rights and Lefts*, *supra* note 29, at 9.

examples of services or alterations that can be made to ensure that LGBT students are receiving the same, or substantially similar, benefits as non-LGBT students.

A. The Model

1. *Elementary/Primary Level*

One of the key benefits offered by early childhood educational institutions is support in the development of identity and a healthy psychological view of self.³⁰² Particularly in the first years of early childhood education, teachers play a crucial role in identity development.³⁰³ In this context, LGBT-specific services and amenities may include the following:

a. *Sexual Orientation and Gender Identity Affirming Instruction & Curricula*

As demonstrated in the first vignette,³⁰⁴ teacher queer-phobia can have lifelong impacts on how queer students view themselves.³⁰⁵ The reasoning in *Brown* is instructive: how a teacher addresses young children's gender expression may ultimately impose "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."³⁰⁶

Because identity development is the key benefit offered at the elementary education level, Title IX requires more than simply remaining neutral on LGBT identity and topics.³⁰⁷ To ensure that LGBT students are developing a sense of self-worth equal to their peers, institutions must actively affirm LGBT life

³⁰² Orly Rachmilovitz, *No Queer Child Left Behind*, 51 U.S.F. L. REV. 203, 210 (2017).

³⁰³ *Id.* at 217 ("Nowhere is the denial of exploration in identity development more critical than to children in a developmental stage that centers around this task.").

³⁰⁴ See *supra* section III.D.1.

³⁰⁵ See *supra* section III.D.2.

³⁰⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

³⁰⁷ Tracy Burt et al., *Do No Harm: Creating Welcoming and Inclusive Environments for Lesbian, Gay, Bisexual, and Transgender (LGBT) Families in Early Childhood Settings*, YC YOUNG CHILDREN, Jan. 2010, at 97, 98 ("All too often, without even realizing it, educators harm children and families through personal assumptions or biases and institutionalized silence. When children never hear words nor see images that reflect their families or themselves in positive ways, they are being harmed."); Michelle L. Page, *Teaching in the Cracks: Using Familiar Pedagogy to Advance LGBTQ-Inclusive Curriculum*, 60 J. ADOLESCENT & ADULT LITERACY 677, 678 (2017) ("One of the greatest traumas that gender- and sexual-minority students experience is not bullying but invisibility and silence. . . . It creates 'stigmatizing messages' that these students are not valued. Students' identities are erased and invalidated.").

and lifestyles in class instruction and in the resources they provide.³⁰⁸ Research on the impact of curriculum representation on students of color finds “greater academic performance, education aspirations, and academic self-confidence,”³⁰⁹ where efforts to promote representation are implemented. The same is likely true for queer students.³¹⁰

Failing to feature positive, or any, imagery of LGBT life can severely affect how LGBT students view themselves, and that failure deprives them of the most essential benefit provided by the elementary education stage.³¹¹ As lesbian essayist Adrienne Rich has aptly phrased: “[W]hen someone with the authority of a teacher, say, describes the world and you are not in it, there is a moment of psychic disequilibrium, as if you looked into a mirror and saw nothing.”³¹²

The need for LGBT-identity-affirming instruction and resources is particularly vital in light of the consideration that young queer persons are unlikely to have other LGBT role models or family members.³¹³ Orly Rachmilovitz has pointed out: “As opposed to racial or religious minority youth whose community may typically share their racial or religious identity and can therefore provide guidance, support, and encouragement during the stages of identity development, LGBT youth usually have no such inherent support system.”³¹⁴

Given LGBT children’s unique needs for representatives, specific examples of resources include books, pictures, photos, puzzles, and movies that feature positive LGBT protagonists; featuring an examination of LGBT families during conversa-

³⁰⁸ See Sarah Warbelow, *LGBT Youth Legal Landscape*, 23 TEMP. POL. & C.R.L. REV. 413, 426–27 (2014) (“The ability of students to see themselves positively represented in curriculum has an influence on both psychological well-being and academic success.”).

³⁰⁹ *Id.* at 427.

³¹⁰ *Id.* (“Though not fully researched, presumably the effects of positive curricula on LGBT youth would mirror the effects on other minority populations.”).

³¹¹ Cf. LEE KLINGER LESSER ET AL., MAKING ROOM IN THE CIRCLE: LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILIES IN EARLY CHILDHOOD SETTINGS 112 (2005) (“[Teachers] should have stopped homophobic remarks and used them as a springboard to discuss fairness, equality, and the contributions made by gay people so that I could be proud of myself. I should have grown up with their support and love because it was their ethical responsibility to me, a five-year-old gay boy in their care.”).

³¹² ADRIENNE RICH, *Invisibility in Academe*, in BLOOD, BREAD, AND POETRY: SELECTED PROSE 1979–1985, at 198, 199 (1994).

³¹³ Jason D.P. Bird et al., *The Impact of Role Models on Health Outcomes for Lesbian, Gay, Bisexual, and Transgender Youth*, 50 J. OF ADOLESCENT HEALTH 353, 353 (2012).

³¹⁴ Rachmilovitz, *supra* note 302, at 220.

tions on family types;³¹⁵ and using gender-affirming language for children who have indicated an alternative gender identity.³¹⁶ More importantly, institutions must train teachers on how to address LGBT topics in order to provide an inclusive, welcoming, and affirming environment in order to aid a young LGBT student's identity formation; recent studies suggest teachers are woefully undertrained to address these issues.³¹⁷

2. Secondary Level

During the secondary level of education, educational institutions provide important benefits in terms of the development of healthy social and emotional skills, as well as lay the foundation of good adult citizenship.³¹⁸ During high school, most teenagers develop crucial competencies they need for their transition into adulthood.³¹⁹ Additionally, the high school period is typically when queer youth become aware of their sexual and gender identity.³²⁰ Unfortunately, high school is often filled with discrimination, bullying, and exclusion for LGBT youth.³²¹ In this context, LGBT-specific services and amenities could include the following:

³¹⁵ See, e.g., Michael Alison Chandler, *In D.C. Schools, Gay-Tolerance Lessons Are Becoming Elementary*, WASH. POST (Feb. 4, 2012), https://www.washingtonpost.com/local/education/in-dc-schools-gay-tolerance-lessons-are-becoming-elementary/2012/01/29/gIQA8YLFqQ_story.html [https://perma.cc/Y6U4-UTNX] (discussing the integration of LGBT identity in pre-kindergarten classes).

³¹⁶ See Rebecca Prinster, *Words Matter: Affirming Gender Identity Through Language*, INSIGHT INTO DIVERSITY (May 16, 2016), <http://www.insightintodiversity.com/words-matter-affirming-gender-identity-through-language/> [https://perma.cc/8G36-GNNS] (using preferred language "affirms" gender identity).

³¹⁷ Megan Beren, *Gay and Lesbian Families in the Early Childhood Classroom: Evaluation of an Online Professional Development Course*, LEARNING LANDSCAPES, Autumn 2013, at 61, 76 (finding that LGBT topics are rarely discussed in teacher education programs).

³¹⁸ See Kelli Kristine Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools*, 24 GOLDEN GATE U. L. REV. 67, 71 (1994).

³¹⁹ *Id.*

³²⁰ Joyce Hunter & Robert Schaecher, *Stresses on Lesbian and Gay Adolescents in School*, 9 SOC. WORK EDUC. 180, 180 (1987) ("An awareness of a homosexual orientation often emerges in students during their high school years. A significant portion of these self-identified youngsters experience unique stresses that the school system needs to recognize and address in an affirmative manner.").

³²¹ See Gerald Unks, *Thinking About the Gay Teen*, in THE GAY TEEN: EDUCATIONAL PRACTICE AND THEORY FOR LESBIAN, GAY, AND BISEXUAL ADOLESCENTS 3, 5 (Gerald Unks ed., 1995) ("While forces in the larger adult society might hint at political correctness, acceptance, and accommodation, the high school—the center of most adolescent life and culture—stands staunchly aloof and rigidly resistant to even a suggestion that any of its faculty or student body might be homosexual or

a. *LGBT-Issue Trained Counselors*

Many schools provide counselors to help high school students navigate adolescence.³²² Unfortunately, often such counselors are ill-equipped and unprepared to sufficiently provide support for queer youth.³²³ This is especially concerning in light of statistics indicating that LGBT youth face significantly higher rates of bullying,³²⁴ which leads to lower grades, increased absences, higher levels of depression, and lower levels of self-esteem.³²⁵

To address issues specific to the challenges queer youth face, schools should begin training counselors to address the needs of LGBT students. Specific training could include a familiarity with LGBT-inclusive educational resources, discretion with student's sexual and gender identities, and even training on how to best help LGBT students select and apply to tertiary institutions where they will be most comfortable.³²⁶

b. *LGBT-Specific Sexual Education*

As discussed in the second vignette,³²⁷ high school sexual-education classes may often fail to instruct students on topics that are useful for LGBT youth.³²⁸ This is undoubtedly the

that homosexuals deserve anything but derision and scorn within its walls. High schools may be the most homophobic institutions in American society").

³²² AM. SCH. COUNSELOR ASS'N, THE ESSENTIAL ROLE OF HIGH SCHOOL COUNSELORS 1 (2017), <https://www.schoolcounselor.org/asca/media/asca/Careers-Roles/WhyHighSchool.pdf> [<https://perma.cc/A6T4-S7LQ>].

³²³ See Ryan M. Kull et al., *Preparing School Counselors to Support LGBT Youth: The Roles of Graduate Education and Professional Development*, PROF. SCH. COUNSELING, Jan. 2017, at 13, 14 ("[E]ducators in general have been found to intervene only infrequently in the victimization of LGBT students").

³²⁴ JOSEPH G. KOSCIW ET AL., GLSEN, THE 2013 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 21 (2014), https://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf [<http://perma.cc/L9YP-SE6Z>].

³²⁵ *Id.*

³²⁶ See generally Jeffrey D. Cook, *Searching for Gay-Friendly Colleges: How Guidance Counselors Can Help Their Gay Students*, J.C. ADMISSION, Summer 2001, at 9 (discussing the importance of guidance counselors in a gay youth's college search and application process).

³²⁷ See *supra* section III.D.2.

³²⁸ According to one study, "only 3.8% [of students] reported their health curricula acknowledging sexual and/or gender orientation." L. Kris Gowen & Nichole Wings-Yanez, *Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning Youths' Perspectives of Inclusive School-Based Sexuality Education*, 51 J. SEX RES. 788, 788 (2014); see also John P. Elia & Mickey Eliason, *Discourses of Exclusion: Sexuality Education's Silencing of Sexual Others*, 7 J. LGBT YOUTH 29, 45 (2010) ("The ways in which the majority of sexuality education programs/classes/offerings have been carried out both nationally and internationally mostly

deprivation of an educational benefit, because “[h]uman sexuality, unlike calculus, is something you will actually need to know for the rest of your life.”³²⁹ As we have seen, where sexual education classes do include discussions of sexual orientation and gender identity, it is often in tandem with conversations on HIV and AIDS; bolstering the stereotype that “only gay people get [AIDS].”³³⁰

In other instances, no-promo-homo laws actively deprive LGBT students of information on safe sexual practices, or stigmatize queer students.³³¹ These no-promo-homo laws may restrict teachers from discussing homosexuality,³³² prohibit teachers from portraying homosexuality positively,³³³ or require teachers to portray homosexuality as “an unacceptable lifestyle, a criminal offense, or a cause of sexually transmitted infections.”³³⁴ Unquestionably, this is degrading to students who are queer.³³⁵

By suggesting that LGBT persons are inherently criminal, these laws impose feelings of inferiority upon queer youth during a crucial stage of the development of their sexual identities.³³⁶ Further, these classes fail to effectively provide LGBT youth with information on safe sexual practices relevant to their potential experiences.³³⁷ Statistics indicate that LGBT

defaults to the heteronormative mode. . . . The most common discourses surrounding sexuality education have pushed LGBTQ issues into the margins or have systematically erased them altogether . . .”).

329 Tiffany Pham, *Stepping out of the Closet: Creating More Inclusive Sexual Education Instruction for Texas Public Schools*, 17 TEX. TECH. ADMIN. L.J. 347, 347 (2016) (citing *Last Week Tonight with John Oliver: Sex Ed* (HBO Aug. 9, 2015)).

330 Gowen & Wings-Yanez, *supra* note 328, at 792.

331 See generally Rosky, *supra* note 272 (discussing the prevalence and effects of “no promo homo” laws).

332 *Id.* at 1469 (“In South Carolina, health education programs ‘may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.’”).

333 *Id.* at 1470 (“Arizona law prohibits teachers from offering any ‘instruction which . . . [p]romotes a homosexual life-style,’ ‘[p]ortrays homosexuality as a positive alternative life-style,’ or ‘[s]uggests that some methods of sex are safe methods of homosexual sex.’” (alterations in original)).

334 *Id.* at 1470–71 (noting that both Texas and Alabama require teachers to inform students that homosexual intimacy is criminalized under state law).

335 *Id.* at 1520.

336 *Id.* at 1519–22.

337 See *A Call to Action: LGBTQ Youth Need Inclusive Sex Education*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/a-call-to-action-lgbtq-youth-need-inclusive-sex-education> [<https://perma.cc/9SPN-Y8SM>] (“LGBTQ-inclusive sex education is not available for most youth. The GLSEN 2013 National School Climate Survey found that fewer than five percent of LGBT students had health classes that included positive representations of LGBT-related topics.”).

students at schools that do not have LGBT-inclusive sexual education classes face higher risk of HIV infection, bullying, and suicide.³³⁸ What is more, the exclusion of LGBT-specific sexual education is damaging to the queer student's psyche.³³⁹

In order to ensure that LGBT students are not deprived of information and the experience that their heterosexual and cisgender cohorts receive, a substantive equality approach to Title IX would require schools to expand their sexual-education curriculums to include coverage of topics relevant to the sexual health of LGBT youth. Such an approach would require sexual education classes to refrain from expressing prejudices against, or fueling misinformation about, LGBT intimacy, which will ensure that queer youth receive the benefit of instruction that will help them navigate adult sexual relationships.

c. *LGBT Affirming Social Atmosphere*

As addressed in the second vignette,³⁴⁰ a queer student's Title IX rights are violated where they have been prohibited from attending social events based on their sexual orientation, gender identity, or gender expression.³⁴¹ In recent years, LGBT students have routinely been prohibited from attending, or physically excluded from, social events because of their apparel or choice of date.³⁴² These social events constitute "benefits,"

³³⁸ See *supra* notes 259–61 and accompanying text.

³³⁹ Scott N. Ihrig, *Sexual Orientation in Law School: Experiences of Gay, Lesbian, and Bisexual Law Students*, 14 LAW & INEQ. 555, 570 (1996) ("[E]xclusion itself matters. Forced invisibility can be more damaging than outright hostility. With hostility, your existence is acknowledged Invisibility and exclusion, though, are elusive; they are difficult to define and grasp. It hides us from history and allows others to deny our existence, to reject our claims to basic civil rights, and to define us as evil-child-molesting-family-wrecking sinners.").

³⁴⁰ See *supra* section III.D.2.

³⁴¹ See, e.g., Castillo Letter, *supra* note 276 (demonstrating that excluding LGBT students from social events because of their sexual orientation or gender identity violates Title IX); *SPLC Helps LGBT Student Assert Her Right to Wear Prom Tuxedo*, SOUTHERN POVERTY L. CTR. (May 16, 2018), <https://www.splcenter.org/news/2018/05/16/splc-helps-lgbt-student-assert-her-right-wear-prom-tuxedo> [<https://perma.cc/M762-PZFF>] (describing a Title IX argument in a case where a lesbian was barred from prom for wearing gender nonconforming clothing); see also, e.g., *Logan v. Gary Cmty. Sch. Corp.*, No. 2:07-cv-431-JVB, 2008 WL 4411518, at *4 (finding a genuine Title IX issue in a case where "Plaintiff and Defendants disagree on the reason Logan was excluded from the prom. Plaintiff indicates that it was because of his sex, while Defendants claim it was because of his dress.").

³⁴² See, e.g., Kate Briquet, *School Banned Gay Prom Dates: Lawsuit*, DAILY BEAST (May 12, 2017, 1:00 AM), <https://www.thedailybeast.com/school-banned-gay-prom-dates-lawsuit> [<https://perma.cc/PZ42-KDPW>] (detailing a Buffalo high school's restrictions against same-sex prom dates); AnnaLise Coble, *No Prom for*

for the purposes of Title IX, particularly because of the importance of social-skill development during adolescence. Viewed thus, in order to ensure that queer students are not deprived of these opportunities, a substantive equality approach to Title IX would require that schools do not restrict a student's choice of apparel or date based on queerphobic biases.

3. *Higher Education*

For many LGBT students, college is the first time they experience life away from home and can explore relationships, intimacy, sexuality, and personhood outside the confines of parental supervision. It may also be the first time that queer students have a chance to freely express their sexual orientation or gender identity and have access to the related medical and healthcare services. Within this context, LGBT specific services and amenities could include the following:

John Tyler High School Senior, EAST TEX. MATTERS (Apr. 30, 2018, 8:50 PM), <https://www.easttexasmatters.com/news/local-news/no-prom-for-john-tyler-high-school-senior/1152137049> [<https://perma.cc/8X79-CRAR>] (detailing a school's exclusion of a lesbian student's girlfriend from prom); Valerie Edwards, *Gay Couple Banned from School Prom by Assistant Principal Who then Suspends Them when They Complain to Their Mothers*, DAILY MAIL (Mar. 6, 2016, 9:59 PM), <https://www.dailymail.co.uk/news/article-3479807/Gay-couple-banned-school-prom-assistant-principal-suspends-complain-mothers.html> [<https://perma.cc/7NfJ-4QG4>] (detailing a gay couple excluded from prom because "same sex couples going to prom 'were against school regulations'"); Rex W. Huppke, *Senior Girl Pushes Back, Allowed to Get Dressed up, in Tux, for Prom*, CHI. TRIB. (Mar. 31, 2011), <http://www.chicagotribune.com/news/ct-xpm-2011-03-31-ct-met-prom-tux-20110331-story.html> [<https://perma.cc/Q2VM-TABU>] (detailing a school's attempt to exclude a lesbian student from prom for wearing a tuxedo); Barry Lebowitz, *Constance McMillen, Focus of "Lesbian Prom" Fight, Wins Discrimination Settlement*, CBS NEWS (July 21, 2010, 4:53 AM), <https://www.cbsnews.com/news/constance-mcmillen-focus-of-lesbian-prom-fight-wins-discrimination-settlement/> [<https://perma.cc/8NXX-SBFJ>] (detailing a Mississippi High School student's lawsuit against her high school that canceled its prom rather than allow her to attend with a female date); Yanan Wang, *Pennsylvania Girl Says She Was Thrown Out of Her Prom for Wearing a Suit*, WASH. POST (May 9, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/05/09/pennsylvania-girl-says-she-was-thrown-out-of-her-prom-for-wearing-a-suit/> [<https://perma.cc/S64A-MWE3>]; Press Release, Lambda Legal, *Lambda Legal Reaches Settlement Agreement with Indiana School District After Transgender Student Was Barred from Prom* (Jan. 28, 2011), https://www.lambdalegal.org/news/in_20110128_reaches-agreement [<https://perma.cc/4XFB-7LGJ>] (detailing a settlement in a lawsuit by a transgender student barred from prom). Indeed, the 2015 GLSEN Study found that 26.5% of LGBT students' schools had prevented same-sex couples from attending school dances and 15.6% had been personally barred from attending dances with a same-sex date. See KOSCIW ET AL., *supra* note 268, at 36.

a. *LGBT-Inclusive Sexual Assault Education, Prevention Programs & Treatment*

The third vignette demonstrated the importance of integrating LGBT topics into an institution's sexual assault education and prevention programs.³⁴³ Presently, the majority of orientation programs fail to discuss same-sex sexual assault—putting queer students at a disadvantage.³⁴⁴ Moreover, rape aggression defense classes may be restricted based on gender, again depriving queerfolk of the opportunity to learn crucial defense skills. Indeed, as of March 2017, no on-campus programs aimed at preventing sexual assault have been tested amongst LGBT college students.³⁴⁵

The inadequacies of sexual assault programs are particularly jarring in light of recent statistics indicating higher rates of sexual assault against LGBT college students in comparison to their heterosexual and cisgender colleagues.³⁴⁶ To ensure that LGBT students are not deprived of advantages or services that other heterosexual and cisgender students receive, a substantive equality approach to Title IX requires colleges integrate LGBT related topics into their sexual assault programming. Specific programs might include sexual violence and self-defense classes that are geared towards the needs of all genders, and LGBT students in particular.³⁴⁷

³⁴³ See *supra* section III.D.3.

³⁴⁴ Erin Schumaker, *How Some Colleges Put LGBT Students at Greater Risk of Sexual Assault*, HUFFINGTON POST (Mar. 29, 2017, 5:12 PM), https://www.huffingtonpost.com/entry/lgbt-students-sexual-assault_us_58d2abb7e4b02d33b747b4a4 [<https://perma.cc/J9R6-B7HJ>] (“Current college sexual assault prevention programs typically don't include LGBT intervention strategies or concerns . . .”).

³⁴⁵ Andrew M. Seaman, *Campus Environment Tied to Sexual Assault Risk for LGBT People*, REUTERS (Mar. 29, 2017, 6:08 PM), <https://www.reuters.com/article/us-health-lgbt-college-assault/campus-environment-tied-to-sexual-assault-risk-for-lgbt-people-idUSKBN170351?> [<http://perma.cc/8PRA-6CMS>].

³⁴⁶ ASS'N OF AM. UNIVS., *CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 34–35* (2015) (reporting that 60.4% of lesbian and gay students report having been sexually assaulted on campus in comparison to 45.8% of their heterosexual counterparts); see also Casey Quinlan, *The Campus Sexual Assault Epidemic Is Even Worse for LGBTQ Students*, ESTABLISHMENT (Apr. 26, 2016), <https://theestablishment.co/the-campus-sexual-assault-epidemic-is-even-worse-for-lgbtq-students-98caa6afc9dd> [<http://perma.cc/HVL2-CXLB>].

³⁴⁷ E.g., *Cal Self Defense for All*, UC BERKELEY, <https://campusclimate.berkeley.edu/students/centers-educational-justice-community-engagement/gender-equity-resource-center/geneq> [<https://perma.cc/4HM4-JTKW>]; see also, e.g., *LGBTQ Self-Defense*, CTR. FOR ANTI-VIOLENCE EDUC., <https://caeny.org/programs/adults/lgbtq/> [<https://perma.cc/HN9J-YQUM>].

An LGBT-focused sexual-assault-prevention training offered at the University of California, Berkeley,³⁴⁸ for example, teaches students general self-defense techniques, in addition to techniques for safely navigating relationships, intra-relationship violence, and online dating. These topics are likely of vital importance to LGBT students on campus: First, research finds that, on the whole, queerfolk experience heightened rates of intra-relationship violence compared to their non-queer counterparts,³⁴⁹ and that rates of intimate partner violence are especially high for transgender women³⁵⁰ and LGBT college students.³⁵¹ Equally, discussions of self-defense within queer relationships may be a critical tool for LGBT students, given the law's failure to address the unique challenges that violence presents within LGBT relationships.³⁵² Secondly, maintaining safety while online dating is of particular interest to LGBT students given the popularity of online dating apps within the queer community, as well as the recent spate of high-profile

³⁴⁸ E-mail from Micaela Camozzi, Gender Equity Resource Ctr., Univ. of Cal., Berkeley, to Author (on file with *Cornell Law Review*); Univ. of Cal., Berkeley, Queer and Transgender Self Defense Class Course Outline (on file with *Cornell Law Review*).

³⁴⁹ See TAYLOR N.T. BROWN & JODY L. HERMAN, WILLIAMS INST., *INTIMATE PARTNER VIOLENCE AND SEXUAL ABUSE AMONG LGBT PEOPLE 2* (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Intimate-Partner-Violence-and-Sexual-Abuse-among-LGBT-People.pdf> [<https://perma.cc/D4ER-XXMN>] (collecting studies of intimate partner violence in LGBT relationships).

³⁵⁰ *Id.*; see also John Paul Brammer, *Brutal Murder Highlights Intimate Partner Violence in Transgender Community*, NBC NEWS (Jan. 13, 2018, 11:06 AM), <https://www.nbcnews.com/feature/nbc-out/recent-murder-highlights-intimate-partner-violence-trans-community-n837161> [<https://perma.cc/5N7M-EMV3>] (detailing the unique challenges facing transgender victims of intimate partner violence).

³⁵¹ Katie Edwards & Kateryna Sylaska, *Intimate Partner Violence Among LGBTQ+ College Students*, CARSEY INST., Spring 2014, at 1, 1 (reporting that four in ten LGBTQ+ college students have faced intimate partner violence within a current relationship); Adrienne Green & Alia Wong, *LGBT Students and Campus Sexual Assault*, ATLANTIC (Sept. 22, 2015), <https://www.theatlantic.com/education/archive/2015/09/campus-sexual-assault-lgbt-students/406684/> [<https://perma.cc/6C5D-63HW>] (noting that lesbian and gay college youth experienced intimate partner violence at a rate of 12.8% compared to bisexual students' 18.5% and heterosexual students' 9%).

³⁵² See, e.g., Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51, 51 (2013) (detailing the challenges of crafting legal solutions to intimate partner violence faced by transgender persons); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567, 571–81 (1990) (detailing the law's failure to adequately address violence in lesbian relationships); Sharon Stapel, *Falling to Pieces: New York State Civil Legal Remedies Available to Lesbian, Gay, Bisexual, and Transgender Survivors of Domestic Violence*, 52 N.Y. L. SCH. L. REV. 248, 249–50 (2007) (detailing the inadequacies of New York law in addressing LGBT domestic violence).

episodes of violence against sexual-minority victims lured through online dating websites and apps.³⁵³

Also demonstrated, is the fact that post-sexual assault treatment typically fails to provide queer students with benefits equal to those received by their cisgender-heterosexual counterparts. To that end, a substantive equality approach to Title IX might require post-sexual-assault treatment and counseling that is useful to LGBT victims of sexual violence. Specific resources might include gender-neutral and male-specific literature, intake forms with LGBT-inclusive options (i.e., transgender and intersex gender options), and post-assault counseling for unique issues faced by LGBT victims.³⁵⁴ For male victims of same-sex violence, HIV transmission and infections present additional concerns.³⁵⁵ Such victims deserve access to the substantive benefit of post-sexual-assault medical treatment that is adapted to their specific circumstances. Given the probability of high-risk exposure, specific post-sexual-assault treatment for queer men may include post-exposure prophylaxis (PEP) to reduce the possibilities of HIV transmission.³⁵⁶

³⁵³ See, e.g., Chuck Johnston, *Texas Men Accused of Luring Gay Victims via Dating App*, CNN (May 10, 2017, 10:29 PM), <https://www.cnn.com/2017/05/10/us/gay-dating-app-assaults-grindr/index.html> [<https://perma.cc/VW4C-J533>]; Mary Emily O'Hara, *Lured Over Dating Apps, LGBT Men Are Targets of Violence and Crime*, DAILY DOT (Jan. 29, 2016, 12:01 PM), <https://www.dailydot.com/irl/hate-crime-attacks-gay-dating-apps/> [<https://perma.cc/2LQD-2A3T>]; Trudy Ring, *Men Lured to Oklahoma City Home via Grindr, then Robbed at Gunpoint*, ADVOCATE (Sept. 20, 2018, 3:51 PM), <https://www.advocate.com/crime/2018/9/20/men-lured-oklahoma-city-home-grindr-then-robbed-gunpoint> [<https://perma.cc/7ZT9-J62G>].

³⁵⁴ *Victim Centered Care*, *supra* note 295.

³⁵⁵ BRITT HERSTAD, USAID, GENDER-RELATED BARRIERS TO HIV PREVENTION METHODS: A REVIEW OF POST-EXPOSURE PROPHYLAXIS (PEP) POLICIES FOR SEXUAL ASSAULT 1, 9 (2009) (noting male victims of same-sex sexual violence "have a higher risk of acquiring HIV from an assault").

³⁵⁶ See C Fong, *Post-Exposure Prophylaxis for HIV Infection After Sexual Assault: When Is It Indicated?*, 18 EMERGENCY MED. J. 242, 242-43 (2001) (suggesting a higher risk of HIV transmission in the context of male same-sex sexual assault); see also Jessica E. Draughon, *Sexual Assault Injuries and Increased Risk of HIV Transmission*, 34 ADVANCED EMERGENCY NURSING J. 82, 83 (2012) (same); Meredith Scannell et al., *A Meta-Analysis of HIV Postexposure Prophylaxis Among Sexually Assaulted Patients in the United States*, 29 J. ASS'N NURSES AIDS CARE 60, 61 (2018) (demonstrating that Post-Exposure Prophylaxis is "internationally recognized and recommended as a key strategy in preventing HIV in [sexual assault] patients, and should be universally provided to all SA patients" (citation omitted)).

CONCLUSION

This Note demonstrated the inadequacies of applying formal equality solutions to the discrimination that LGBT students face. It took a methodical approach to illustrating how queer students are better served when lawyers, educators, administrators, and activists honor the substantive equality mandate at the heart of Title IX. In the preceding sections, the Note established that Title IX covers LGBT students, defined the benefits of educational opportunities, and illustrated instances when queer students have been deprived of them. Ultimately, this Note concluded with example services and alterations that would ensure that LGBT students received equal educational benefits guaranteed to them under Title IX. While this Note proposed and discussed a few ways in which a substantive equality approach to Title IX could better serve LGBT students, they are certainly not the only ones.

Title IX can prove to be a transformative tool for bettering the position of LGBT students throughout the education system. Amongst courts and scholars, the consensus has been that Title IX was designed with substantive equality underpinnings; this provides the potential for the statute to be used to ensure equality of outcomes, rather than the neutral application of rules. It is also clear that simply ensuring LGBT students have access to existing facets of educational programs is insufficient to ensure that they receive the true and full benefits of educational opportunities. These conclusions, coupled with increasing willingness amongst courts to use Title IX against sexual orientation and gender identity discrimination, provide fertile ground from which queer equity can spring. It is now important to ensure that, when using Title IX to combat discrimination against LGBT students, we honor the substantive equality mandate at its heart and give the statute a "sweep as broad as its language,"³⁵⁷ thereby making certain that no *queer* child gets left behind.³⁵⁸

357 N. Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

358 The final line is adapted from the title of Rachmilovitz's article. See Rachmilovitz, *supra* note 302.

APPENDIX

A. Result List for LexisNexis Case search: "educational opportunity"

Narrowed by: Court: Supreme Court

1. Rogers v. Paul, 382 U.S. 198 (1965)
2. Gaston County v. United States, 395 U.S. 285 (1969)
3. Oregon v. Mitchell, 400 U.S. 112 (1970)
4. Dandridge v. Jefferson Parish Sch. Bd., 404 U.S. 1219 (1971)
5. Spencer v. Kugler, 404 U.S. 1027 (1972)
6. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)
7. Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973)
8. Bradley v. Sch. Bd., 416 U.S. 696 (1974)
9. Milliken v. Bradley, 418 U.S. 717 (1974)
10. Nyquist v. Mauclet, 432 U.S. 1 (1977)
11. Regents of Univ. Cal. v. Bakke, 438 U.S. 265 (1978)
12. Estes v. Metro. Branches of Dallas NAACP, 444 U.S. 437 (1980)
13. Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980)
14. Stone v. Graham, 449 U.S. 39 (1980)
15. Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176 (1982)
16. Crawford v. Bd. of Educ., 458 U.S. 527 (1982)
17. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982)
18. Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982)
19. Bob Jones Univ. v. United States, 461 U.S. 574 (1983)
20. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983)
21. Grove City Coll. v. Bell, 465 U.S. 555 (1984)
22. Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841 (1984)
23. Smith v. Robinson, 468 U.S. 992 (1984)
24. Papasan v. Allain, 478 U.S. 265 (1986)
25. Kadrmas v. Dickenson Pub. Schs., 487 U.S. 450 (1988)
26. Missouri v. Jenkins, 495 U.S. 33 (1990)
27. Freeman v. Pitts, 503 U.S. 467 (1992)
28. Shaw v. Reno, 509 U.S. 630 (1993)
29. Missouri v. Jenkins, 515 U.S. 70 (1995)
30. United States v. Virginia, 518 U.S. 515 (1996)

31. Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668 (1996)
32. Agostini v. Felton, 521 U.S. 203 (1997)
33. Miller v. Albright, 523 U.S. 420 (1998)
34. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999)
35. Zelman v. Simmons-Harris, 536 U.S. 639 (2002)
36. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007)
37. AT&T Corp. v. Hulteen, 556 U.S. 701 (2009)
38. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009)
39. Horne v. Flores, 557 U.S. 433 (2009)
40. Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017)
41. Brown v. Bd. of Educ., 347 U.S. 483 (1954)